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# THE LAW COMMISSION

## PUBLISHED WORKING PAPER

## NO: 41

First Programme Item VI(b)
Personal Injury Litigation
Assessment of Damages

18 October 1971

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THE LAW COMMISSION

WORKING PAPER NO. 41

ITEM VI(b). PERSONAL INJURY LITIGATION - ASSESSMENT OF DAMAGES

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THE LAW COMMISSION

WORKING PAPER NO.41

# PERSONAL INJURY LITIGATION: ASSESSMENT OF DAMAGES

## PART I - INTRODUCTION

### Terms of reference

1. Under Item VI in the Commission's First Programme we recommended the examination of two aspects of Personal Injury Litigation: as Item VI(a), Jurisdiction and Procedure to be examined by an ad hoc committee and, as Item VI(b), the Assessment of Damages to be examined by the Commission. Item VI(a) has been considered by the Winn Committee.[1] In this paper we examine the topics comprised in Item VI(b).[2]

2. In this paper we also deal with certain topics which are related to Item VI(b) as formulated in our First Programme, notably one topic which originally arose for examination under Item XV(a). Under Item XV(a) we have examined, inter alia, in the context of the family group, the actions for loss of services and loss of consortium and the extent to which spouses or parents should be entitled to recover wages or payments made to or on behalf of a spouse or child who is the victim of a tort. In

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1. Report of the Committee on Personal Injuries Litigation Cmnd. 3691/1968, July 1968.

2. In the First Programme Item VI(b) was formulated as follows:-

> "This is a problem which has attracted much attention. Questions for examination include: the usefulness of the jury as an instrument of assessment; limitations upon the revising function of the Court of Appeal; the impact of tax; the proper principles which should govern the award of damages for pain and suffering and for loss of the amenities of life; the adequacy and consistency of current awards of damages."

June 1968 we issued Published Working Paper No. 19 in paragraphs 46-87 of which these particular topics were discussed. It subsequently became apparent that these topics impinged closely on the subject-matter of Item VI(b) and we have decided that our conclusions upon them should be reviewed and presented again with the context of the present paper. Accordingly what is said in Part III - Section (G) below under the general heading "Losses incurred by others" is to be read as representing the Law Commission's revised provisional conclusions on the questions previously canvassed in paragraphs 46-87 of Published Working Paper No. 19. We are not, however, in this paper concerned with the topic (dealt with at paragraphs 9-45 of Published Working Paper No. 19) of employers' claims for loss sustained as a result of personal injuries suffered by persons in their employment caused by the negligence or breach of duty of third parties.

3. Between the work of the Winn Committee and ourselves there has inevitably been some overlapping and that Committee's Report refers to certain topics which are being examined by us: these are the award of damages by periodic payments, the award of damages to a widow, jury trial and the making of a provisional award.[3] We deal with these topics later in this paper, taking, in some respects, a rather different view of them from that of the Committee. We should, however, make it clear that questions of pure procedure and practice are outside the ambit of this paper. We cannot, we think, re-open the whole range of questions examined by the Winn Committee.

4. We also wish to make it plain that we are precluded from an

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3. Cmnd. 3691/1968: paragraphs 374-377, 378-379, 478 and 496-505.

discussion as to whether the principles of liability based on fault should be replaced or supplemented by strict liability or some scheme of damages based on compulsory insurance. This paper is presented upon the assumption that compensation for personal injuries or death will be dealt with in the context of liability based on "fault" (i.e. common law negligence or breach of statutory duty) and that, in default of compromise, liability and its apportionment between the parties to an action will be determined by judicial process in litigation conducted on the adversary system.

The social significance of personal injuries

5. There can be no doubt that personal injuries and the legal claims to which they give rise are of great significance to society. In Appendix 2 we set out an up-to-date version of the statistics of personal injuries quoted by the Winn Committee.[4]

The presentation and arrangement of this paper

6. The figures in Appendix 2 vividly illustrate the social significance of the area of the law with which this paper is concerned. Accordingly in the method of presentation we have adopted for this paper and in the wide circulation we propose to give it we have been guided by what we believe is the interest of the public at large in the assessment of personal injury damages. It is, therefore, largely with the layman in mind that we have thought it will be helpful to set out in Part II a short descriptive summary of the present system. We realise that some of the matters touched upon in Part II are covered again in greater detail in Part III where we consider the different aspects

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4. Cmnd. 3691/1968 paragraphs 33-35.

of the subject from the standpoint of law reform, but we feel that any resultant repetition is justified in order to explain problems which are of interest to laymen no less than to lawyers. Moreover, we are particularly anxious to receive as wide a range of comment as possible upon the various suggestions for law reform which we canvass. In Part III - Sections (A) - (K) - we consider the various aspects of the law which may be thought to be in need of change and set out our provisional conclusions and suggestions for possible reform. For the convenience of the reader we give a short summary of our provisional conclusions and suggestions for possible reform. For the convenience of the reader we give a short summary of our provisional conclusions at Appendix 1, which is printed on one side of the page only leaving blank pages for the writing of notes.

Acknowledgments

7. An earlier version of this paper was circulated to a limited number of experts who attended a seminar on damages for personal injuries at All Souls College, Oxford. We would like to take this opportunity of expressing our gratitude for the help which they and many others have given us, though we would not, of course, wish to attribute to any of them the conclusions reached or the suggestions made in the present paper. A list of those from whom we have received such help will be found at Appendix 3.

## PART II. A SUMMARY OF THE PRESENT SYSTEM

### (A) GENERAL OBSERVATIONS ON THE PRESENT SYSTEM

8. Nearly all claims for damages for personal injury or arising out of death are based upon a defendant's liability as employer of labour, occupier of premises or road user. Such a defendant is nearly always insured. Most plaintiffs who have been injured at work or have a claim arising out of the death of a relative at work will have their claims handled for them at first by a Trade Union and many plaintiffs

injured in motor car accidents will have their claims handled by solicitors with experience of this type of work. From an early stage, therefore, there will be a confrontation between persons or institutions with expertise in the evaluation of claims and this leads, at least in the case of less serious injuries, to many claim being settled without recourse to litigation. In claims involving more serious injuries or death, solicitors are likely to be consulted on both sides, and many of these solicitors will probably specialise in this particular field of litigation and, in many cases, predominantly on either the plaintiff's or defendant's side. Such solicitors know and are used to dealing with their opposide numbers and this fact again leads to many more claims being settled often, in all but the most serious cases, without recourse to litigation.

9. The framework within which negotiated settlements are achieved is provided by the judges, who have devised a more or less precise conventional scale for the compensation of the non-pecuniary loss involved in specific injuries, and methods for the computation of pecuniary loss. This scale and these methods are comparatively easily applied in most cases. If it were not possible to settle cases in the numbers that are at present settled, the Courts would be overwhelmed with personal injury litigation. Without prejudging the questions which arise as to the way in which the scale is made, the evaluations found therein or the correctness of the methods devised, we think it extremely important, therefore, to continue to provide in the system for the assessment of damages sufficient certainty to enable settlements to be negotiated.

10. It is by their decisions in the small minority of the total

number of claims which reach Court that the judges have fixed the scale and devised the methods of computation referred to in the last paragraph and it seems, therefore, desirable that we should begin this paper with an examination of the way in which these decisions are at present made and the legal principles applied in their making. We confine ourselves to the present situation with as little incursion into history as possible. The fundamental principle in the English law of damages is that the plaintiff should be placed in the same financial position as he would have been in had the breach of contract or tort not occurred. Because there is no money equivalent for a physical injury and because damages for personal injury have largely to be assessed upon the basis of an uncertain future, this principle of restitutio in integrum has little scope in personal injury litigation. Its place is taken by a number of rules, statutory and judicial, of greater or lesser artificiality. Our examination of the present system is aimed at throwing into relief those rules which seem to us to merit consideration but, of course, we do not wish to limit in any way comment upon any aspect of the subject.

11. In our summary of the present system it will be convenient if we deal separately with claims made by a living plaintiff and claims arising out of death.

## (B) CLAIMS BY A LIVING PLAINTIFF

### The component items in a claim

**12.** Physical injury or disease suffered by a plaintiff can affect him in a number of different ways and these can be stated with some precision. It is the invariable practice of counsel, having identified the injury or disease itself as the foundation of his client's claim, to make his submission under these rubrics:-

(a) The pain and suffering caused by it before trial.

(b) The disability and loss of amenity caused by it before trial.

(c) The pain and suffering which the plaintiff will probably suffer in the future, which may be prognosed as permanent or temporary.

(d) The disability and loss of amenity which the plaintiff will probably suffer in the future, which again may be prognosed as permanent or temporary.

(e) Loss of life expectancy (i.e. the amount by which the life expectation of the plaintiff is shortened by the injury), which is, of course, a factor only in some cases of serious injury.

(f) Loss of earnings before trial.

(g) Expenses incurred before trial, such as medical and surgical treatment, nursing and similar attention, cost and maintenance of special equipment, and damage to property.

(h) Loss of earnings either total or partial which is expected to continue in the future either permanently or temporarily.

(i) Loss of earning capacity. It may be that a plaintiff at trial is earning as much or more than he was before his accident but that he will be handicapped by his disability if in the future he has to seek employment on the open labour market. Or it may be that because of his disability he has to work longer hours to maintain his earnings at their pre-accident level.

(j) Expenses of the sort referred to in (g) above which are expected to occur or continue in the future either permanently or temporarily.

13. A distinction has been drawn between two classes among these heads of damage, dividing them into items of pecuniary and non-pecuniary loss. Except for items (e) loss of life expectancy[5] and (i) loss of earning capacity,[6] the distinction is self-evident.

"Special damage" and "general damages"

14. A further distinction has been drawn between items of so-called "special damage", which can be defined for this purpose as the pecuniary loss actually suffered up to the date of trial, and "general damages", being the rest.

15. In practice special damage is nearly always the subject of agreement between the parties. It is perhaps worth mentioning that, in arriving at a figure for loss of earnings incurred up to the date of trial, it is not the practice of the parties in negotiation or of the judge, in the few cases where this falls for his decision, to take into account contingencies; it is assumed

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5. See para. 21 below.

6. See para. 22 below.

that the plaintiff would have continued in employment up to the date of trial and, although account, in his favour, is taken of wage increases and anticipated promotion, nothing is allowed to the defendant for the chance that the plaintiff might between accident and trial have become unemployed or employed at a lesser wage.

16. In the assessment of special damage it is doubtful to what extent, if at all, the plaintiff is entitled to recover expenses incurred by other persons whom he is under no legal obligation to recompense,[7] although, in practice, these are frequently taken into account, to some extent at least, in the negotiations for the agreement of special damage.

Non-pecuniary loss

17. As we have mentioned in paragraph 13 above, the distinction between pecuniary and non-pecuniary loss is self-evident: and as a matter of convenience we propose to deal with non-pecuniary loss first. The most important evidence adduced in respect of non-pecuniary loss is the medical evidence, although the evidence of the plaintiff himself and his relatives and friends will also, of course, frequently be led on such aspects of the claim as loss of amenity and pain and suffering. It is becoming more and more frequently the case for the medical evidence to be in the form of agreed reports, although, in cases of grave injury, medical witnesses are often called to supplement the agreed reports and

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7. See Schneider v. Eisovitch [1960] 2 Q.B. 430: Gage v. King [1961] 1 Q.B. 188: Janney v. Gentry (1966) 110 S.J. 408. In Wilson v. McLeay (1961) 106 C.L.R. 523 the High Court of Australia disapproved Schneider's case. See also 76 L.Q.R. 187: 23 M.L.R. 317: 28 Can. B.R. 602.

to assist the Court in their elucidation.[8]

Uncertainty of medical evidence in the assessment of non-pecuniary loss

18. It is obvious that the medical evidence, whether agreed or not, will involve uncertainty perhaps of diagnosis and frequently of prognosis. It is helpful, we think, to distinguish two main types of uncertainty so far as prognosis is concerned. There are the cases where there is a chance that some result of an injury may happen; it is more or less possible that it will happen but it may not. Examples of such cases are where head injury may result in epilepsy, damage to one eye in sympathetic damage to the other, or exposure to radiation in cancer. On the other hand, there are cases where a result, such as osteo-arthritis in a joint, will sooner or later become manifest in more or less painful symptoms; here the uncertainty is as to how soon the result will happen and how severely when it does, not whether it will happen at all.

The "judges' scale" of non-pecuniary damage

19. So far as non-pecuniary loss is concerned, the submissions to the Court are made under the various heads of damages referred to above. The starting point will usually be the conventional scale for the particular injury and this scale will, within narrow limits, be known to the lawyers taking part in the trial. The efforts of the parties will be directed towards showing that the particular injury in issue is worse than or not so bad as the norm. Reference will nowadays probably be made to awards in

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8. See Jones v. Griffith [1969] 1 W.L.R. 795 where the Court of Appeal approved this practice.

similar cases, and Kemp & Kemp, The Quantum of Damages, is nearly always to be seen on the judge's bench and in the hands of counsel. It is accepted by everyone that the scale exists and there is no argument which can usefully be deployed by counsel in favour of any alteration of the scale as such, save only that, for a particular injury, the scale has remained the same for long enough and should be increased to take account of changed economic conditions.[9]

20. Where the injury is so uncommon that it has escaped being pigeon-holed or where a number of separate injuries have to be compensated, argument is often based on analogy, the submissions being that this injury or complex of injuries is worse than or not as bad as an injury the place of which in the scale is known.

Damages for loss of expectation of life

21. Since the decision in Oliver v. Ashman[10] damages for any loss of expectation of life which the plaintiff has suffered will be claimed under the head of non-pecuniary loss and will be compensated for by a small conventional sum.[11] Consequently little attention will be paid to it, except perhaps to stress, where appropriate, the plaintiff's knowledge that his expectation of life has been shortened as an element of pain and suffering.[12]

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9. See Gardner v. Dyson [1967] 1 W.L.R. 1497 referred to in Kemp & Kemp, The Quantum of Damages, 3rd Ed., Vol. 1, 7th Supp., where the Court of Appeal effectively doubled the scale figure for the loss of an eye.

10. [1962] 2 Q.B. 210.

11. See Benham v. Gambling [1941] A.C. 157.

12. See Davies v. Smith (1958) C.A. No.34a referred to in Kemp & Kemp, The Quantum of Damages, 3rd Ed., Vol. 1, at p.80.

Loss of earnings and earning capacity

22. If there is no actual loss of earning at the time of trial, but there is a loss of earning capacity this may be treated in argument as part of the non-pecuniary loss. However, as its only result in the future is a possible pecuniary loss, although one incapable of accurate computation, its proper place would seem to be as a head of pecuniary loss.

The detailed considerations to be taken into account in assessing pecuniary loss

23. It is when the subject of future pecuniary loss comes under consideration that an attempt can be made to compute more scientifically the proper sum in which to compensate the plaintiff. The computation is based on the net[13] amount by which in future the plaintiff's earnings will be less than they would have been and the amount of future expenses which will be incurred by him as a result of his injuries. There is, of course, bound to be a good deal of uncertainty in many cases as to what these future losses will be, although partial future loss of earnings is not infrequently presented to the Court as an agreed figure.

24. Submissions as to these probable amounts are followed by submissions directed to the calculation in the final result of a lump sum award sufficient to compensate the plaintiff for what he has lost and will have to spend, less proper discounts and allowances and without taking into account what he would have done with the money he has lost by reason of his injury.

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13. The plaintiff's liability to income tax and surtax must be taken into account, (British Transport Commission v. Gourley [1956] A.C. 185) as must the expenses which the plaintiff would have incurred in his trade or profession.

25. The discounts and allowances taken into account do not include payments under insurance policies,[14] payments made to him from charity or benevolence[15] or pensions whether or not discretionary and whether or not contributory.[16] The position of National Insurance benefits is regulated by statute.[17] There is some doubt as to whether Unemployment Benefits or Supplementary Benefits should be included.[18] If a plaintiff has lost a pension he must give credit for such pension as he will in fact receive.[19]

26. So far as future expenses are concerned, a defendant is allowed to set off certain expenses saved so long as they are in pari materia with the future expenses which are being compensated.[20]

27. Although the plaintiff's expectation of life has been reduced he is only entitled to recover damages for his loss of earnings during the period for which he is likely to remain alive; he can recover nothing for the period for which he probably would have lived but for the accident.[21]

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14. Bradburn v. Great Western Railway Company (1874) L.R. 10 Ex. 1.

15. Liffen v. Watson [1940] 1 K.B. 556.

16. Parry v. Cleaver [1970] A.C. 1.

17. Law Reform (Personal Injuries) Act 1948 s.2.

18. Parsons v. B.N.M. Laboratories [1964] 1 Q.B. 95: Foxley v. Olton [1965] 2 Q.B. 306: Eldridge v. Videtta (1964) 108 S.J. 137. In Hewson v. Downes [1970] 1 Q.B. 73 the judge, following Parry v. Cleaver, held that a state retirement benefit was not deductible.

19. Parry v. Cleaver ibid.

20. Shearman v. Folland [1950] 2 K.B. 43.

21. Oliver v. Ashman [1962] 2 Q.B. 210.

Computation of pecuniary loss as a lump sum capital amount

28 The next stage in the argument is as to the way in which the future loss should be reduced to a capital sum. The two main factors in this equation are the annual loss and the period over which the loss will continue. Clearly the capital sum required is not the annual loss multiplied by the full period because this would not take into account the interest which the capital sum will, if invested, earn over the period. In addition the Courts have said that "contingencies" must be taken into account, by which is usually meant such things as the chance that the plaintiff might not have continued in gainful employment even had there been no accident. That a plaintiff might, apart from the accident, have gone on working after normal retirement age is not so frequently produced as an effective argument for increasing damages.[22] Another factor which ought to be taken into consideration and can and is properly adverted to in argument is the incidence of tax on the unearned income notionally to be derived from the capital sum. To what extent the probability of inflation must be taken into account is open to question. It is doubtful whether the judge should take the probability of inflation into account and, if so, how this should be done.

29. The matters mentioned in the previous paragraph are all things which, in other contexts, actuaries are dealing with daily but it is only in comparatively few, usually very serious, cases that actuarial evidence has been led to assist the Court in the solution of this sort of problem. It is much more usual for submissions to be made upon these factors in an attempt to get as

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22. But see Bresatz v. Przibilla (1962) 36 A.L.J.R. 212 referred to in Kemp & Kemp. The Quantum of Damages, 3rd Ed., Vol. 1, 7th Supp.

high or low a "multiplier" as possible applied to the future annual loss. By "multiplier" is meant the number of years' purchase which "when applied to the lost benefit expressed as an annual sum, gives the amount of damages, which is a lump sum". This use of a "multiplier" is said to be the "normal method" and it is further said that "the experience of practitioners and judges in applying the normal method is the best primary basis for making assessments".[23]

30. The submissions in fact made by counsel in the majority of cases lack any mathematical, actuarial, statistical or other scientific basis. In a field which, in our view, is susceptible of a more sophisticated analytical approach, the forensic dialogue is usually no more than the bartering of two multipliers which are suggested as the correct "scale multipliers" for the particular situation in issue.

Sources of error in the computation of the lump sum award

31. Upon this sort of evidence and within these rules the judge has to attempt to compensate the plaintiff. In making this attempt he is constrained by the rule that he must award a lump sum once-and-for-all payment. Insofar as this is an attempt to compensate the plaintiff for what will happen in an unforeseeable future, it is obvious that such an award may and, in some cases, must result in injustice either to the plaintiff or to the defendant. The main ways in which such injustices may or must result are:-

(a) In the sort of "chance" case envisaged in paragraph 18 where there is, for example, a 10% chance of epilepsy,

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23. See Taylor v. O'Connor [1971] A.C. 115, per Lord Pearson at p.140 D-G.

the Court cannot but make an unjust award. The only way to compensate a plaintiff for such a chance is to decide what the proper award would be if the plaintiff were already suffering from epilepsy and reduce that sum by 90%. If the catastrophe does not occur, the plaintiff is over-compensated; if it does, he is under-compensated.

(b) In the other sort of case envisaged in paragraph 18 where the uncertainties are ones of degree, it is not impossible but highly unlikely that the judge will arrive at the precise figure, which he would have awarded had he known at the time of giving judgment what the future held in store for the plaintiff.

(c) Any computation of the "present value of prospective loss"[24] can be rendered unjust in a number of different ways. Such a computation has to be based upon a period of expected life or working life and premature death or unexpected longevity will produce injustice. Changes in the economic environment in which the plaintiff lives such as inflation and the availability of work may make an award inadequate or too generous.

The itemisation of damages

32. Prior to the implementation of a recommendation as to interes on damages made in the Winn Committee Report by s.22 of the Administration of Justice Act 1969 and the decision of the Court of

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24. British Transport Commission v. Gourley [1956] A.C. 185 per Lord Reid at p.212.

Appeal in Jefford v. Gee,[25] it was the usual[26] practice of judges in awarding damages for personal injury not to itemise the amounts awarded under the separate heads of damage canvassed before them but to award a lump sum which took them into account. This practice made it impossible to argue on appeal that the judge was wrong in his assessment under any given head and led to complicated attempts to dissect the lump sum into its component parts.

33. As a result of the decision of the Court of Appeal in Jefford v. Gee a judge is now obliged, to a limited extent, to itemise his award. Because interest has to be awarded, at different rates, upon the sums given for special damage and non-pecuniary loss but is not to be awarded upon the amount given for future loss of earnings and for future expenses, the total sum has to be divided into these three components. However, no itemisation of the components parts of the special damage or of the non-pecuniary loss is required; the judge is not required to make a division between future loss of earnings and future expenses and need not itemise such future expenses. There is as yet no decision as to which category includes an award for the loss of earning capacity.

Interest on damages and costs

34. Finally, two further matters have to be considered by the

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25. [1970] 2 Q.B. 130.

26. Though not invariable; see Povey v. Governors of Rydal School [1970] 1 All E.R. 841 referred to in Kemp & Kemp, The Quantum of Damages, 3rd Ed., Vol. 1, 7th Supp., where the note does not make clear that the settlement at a reduced figure which was approved by the Court of Appeal was made on an appeal as to liability as well as to damages. Kitcat v. Murphy (1969) 113 S.J. 385: Fletcher v. Autocar Transporters Ltd. [1968] 2 Q.B. 322.

judge. He has to award interest and deal with the question of costs. Interest on damages awarded for non-pecuniary loss will be awarded separately from that for special damage because they are at different rates.[27]

35. If the defendant has made a payment into Court, costs from the date of the payment-in depend upon whether the total sum awarded exceeds the amount in Court or not. The decision of the Court of Appeal in Jefford v. Gee has added complications to this previously simple situation and these complications are particularly important in a field of litigation where claims are frequently compromised. The rules laid down in Jefford v. Gee may be summarised:-

(a) Payments into Court should be made without regard to interest.

(b) If the plaintiff takes the money out of Court he gets no interest.[28]

(c) If the plaintiff recovers less by way of damages than the money in Court, although the addition of interest brings the total payment ordered to be made by the defendant above the payment into Court, "he will have to pay the defendant's costs".[29]

(C) CLAIMS ARISING OUT OF DEATH

Claims under the Fatal Accidents Acts

36. Claims arising out of the death of a person do so either

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27. See para. 261 below.

28. See Newall v. Tunstall [1970] 3 All E.R. 465 and Waite v. Redpath Dorman Long Ltd. [1971] 1 All E.R. 513.

29. [1970] 2 Q.B. 130, per Lord Denning M.R. at p.150A.

under the Fatal Accidents Acts 1846-1959 for the benefit of certain specified dependants or because of the survival for the benefit of the deceased's estate of a claim for damages for loss of expectation of life by reason of the provisions in the Law Reform (Miscellaneous Provisions) Act 1934.

37. For a claim to be sustainable under the Fatal Accidents Acts the deceased must have left a dependant or dependants within the specified class, namely, wife, husband, parent, grandparent, step-parent, child, grandchild, stepchild, brother, sister, uncle, aunt and, in respect of the last four relatives, their issue. One action is brought on behalf of all the dependants.

38. In a claim under the Fatal Accidents Acts the task which faces the judge is to compute as a lump sum the value of the pecuniary benefit that the deceased would have conferred upon his dependants in the future. In this computation the same problems of uncertainty arise as in claims for future pecuniary loss by a living plaintiff. The method adopted by the Courts in making the computation is basically the same as they use in the computation of a capital sum to compensate a living plaintiff for future pecuniary loss.

39. The dependants' evidence is directed primarily towards establishing a figure for the annual value of the dependency at the date of death. It is, at this stage, the total family dependency which is under consideration. In addition, if available, evidence will be led to show that the deceased had prospects of increased future dependency. The age of the deceased at death and of his dependants are relevant factors,

which will, of course, be established by the plaintiff's evidence.

40. As in the case of pecuniary loss suffered by a living plaintiff, the Court can arrive with some degree of certainty at a figure for the annual value of the lost dependency. It is in deciding upon the multiplier to apply to that annual dependency that a Court is bound to embark upon a course which later events may well show to have been unjust.

41. It is by adjusting the multiplier that the Court takes into account the various contingencies of life which might happen or might have happened had the deceased not been killed. There is, of course, a distinction between these two sorts of contingency. What might have happened can never be known; the deceased might have ceased to provide or provide so fully by reason of any one of a number of events which were wholly unforeseen at the date of his death; he might, in any event, have died prematurely, he might have failed in his profession or lost his employment, he might have retired early, or suffered a disabling illness or accident. On the other hand, he might have gone on working beyond normal retiring age or gained unexpected promotion. The other sort of contingency such as premature death or unexpected longevity of the dependant will, of course, cease in the future to be contingent. At present both these sorts of contingency are taken into account in deciding upon the multiplier to use in the reduction of the annual value of the lost dependency into a capital sum.

42. In calculating the damages to be awarded under the Fatal Accidents Acts it is provided by statute that no account shall be

taken of "any insurance money, benefit, pension or gratuity which has been or will be paid as a result of the death".[30] "Benefit" here means benefit under the National Insurance Acts. However, benefits derived from the estate of the deceased are taken into account in reduction of damages. Where there would have been little chance, but for the premature death of the deceased, of the dependant ever receiving the amount in question, the whole amount is normally deducted as it is where the support lost derived during the deceased's lifetime from the money or property forming the estate. But in cases where it was likely that the plaintiff would in any event have received the benefit of the money or property, the Courts deduct only the accelerated value of the payment. Any benefit accruing, or likely to accrue, to a dependant from an award to the deceased's estate under the Law Reform (Miscellaneous Provisions) Act 1934 is deducted in full.[31]

43. Nothing can be awarded to a relative on a claim under the Fatal Accidents Acts as a solatium for the grief and misery caused by the deceased's death, nor can any award be made for a non-pecuniary loss such as a child's deprivation of the care of a parent.

44. When the Court has decided upon the total sum to be awarded in compensation for the lost dependency, that sum has to be divided between the dependants on whose behalf the action is brought. The present practice of the Courts in the common situation of a widow with dependent children is to award the bulk

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30. Fatal Accidents Act 1959.

31. Davies v. Powell Duffryn Associated Collieries [1942] A.C. 60

of the total sum to the widow and give comparatively small sums to the dependent children. The reason for giving these small sums which do not represent the full dependency of the children is that it will be the widow who, in the future, has to provide for the children and it is said that she should, therefore, be placed in control of the total sum out of which such provision will have to come.

45. Finally, it should be pointed out here that if the deceased has, in his lifetime, recovered damages for personal injury and that injury subsequently causes his death, his dependants cannot then bring another action under the Fatal Accidents Acts.

The Law Reform (Miscellaneous Provisions) Act 1971

46. The Law Reform (Miscellaneous Provisions) Act 1971 will make a considerable change in the method of assessment of damages in Fatal Accidents Acts claims. In future neither the prospects of a widow remarrying nor, indeed, the actual fact of her having, before trial, remarried will be taken into account in assessing her damages. This will obviously have the effect of very substantially increasing the damages awarded to the young childless widow whereas the middle-aged widow with children, whose remarriage prospects were, prior to the Act, almost completely discounted, will be awarded no more than before. The provisions of this Act are an extreme example of the artificiality of the rules used to assess damages in personal injury and death cases. We consider its provisions in greater detail in paragraphs 142-150 below.

The Law Reform (Miscellaneous Provisions) Act 1934

47. The Law Reform (Miscellaneous Provisions) Act 1934 lays down the general rule that on the death of any person all causes of action vested in him shall survive for the benefit of his estate. Where personal injury causes loss of expectation of life, damages can be recovered for that loss by a living plaintiff[32] and the cause of action for these damages will survive to his estate whether or not the death is caused by the injury and whether or not, if caused by the injury, death arises at once or after a period of time.[33] Similarly a claim for non-pecuniary loss suffered but not compensated before death will survive to the deceased's estate.[34]

48. The damages to be awarded in the normal case for loss of expectation of life have been fixed by the judges at a conventional figure of £500.[35] But again nothing can be awarded to a relative as a solatium for the grief and misery caused by the deceased's death.

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32. Flint v. Lovell [1935] 1 K.B. 354.

33. Rose v. Ford [1937] A.C. 826: Morgan v. Scoulding [1938] 1 K.B. 786.

34. Swift v. Prout (1964) 108 Sol. J. 317.

35. Benham v. Gambling [1941] A.C. 157: Naylor v. Yorkshire Electricity Board [1968] A.C. 529.

## PART III. MATTERS FOR CONSIDERATION

### The desirable objectives of law reform

49. In our detailed examination of the matters comprised in Sections (A) - (K) below and in our provisional conclusions on the ways in which the law requires to be reformed, we have been guided by the objectives that the law relating to damages for personal injuries should, as far as possible, aim at achieving. These, it seems to us, should be as follows:-

(a) An injured party should be compensated for the loss which he has suffered and, where he has died from his injuries, his dependants should be compensated for their loss.

(b) The law should produce predictable results.

(c) The law should operate uniformly in uniform circumstances.

(d) The law should be fair to both plaintiffs and defendants.[36]

(e) Where the loss can be quantified in money with reasonable accuracy the plaintiff should be awarded the full amount of his loss as so quantified.

(f) Where the loss cannot be so quantified, the plaintiff should be awarded a sum determined on principles which can be rationally justified and which would be regarded by the public at large as fair in all the circumstances.

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36. In personal injury litigation some critics of the present law tend to overlook the need for the system to produce a result which is fair to defendants no less than to plaintiffs.

The arrangement of the material in Part III

50. There are a number of matters which we think call for consideration arising out of the present system of computing and awarding damages in these claims, but they are not easily put into separate compartments; there are matters of substantive law which are closely connected with matters of method and practice; and most of them are inter-connected with each other and a provisional recommendation upon one matter affects the consideration of others. Some of these matters are susceptible to alteration only by legislation whereas others could be changed, if change is thought desirable, more easily by changes in practice.

51. We deal first with the rule in Oliver v. Ashman not because we think that is in any way the most important of the matters we consider but because, if this rule were abolished, it would have an effect on many of the other matters which call for consideration. Loss of expectation of life and claims under the Law Reform (Miscellaneous Provisions) Act 1934 are closely connected with the rule in Oliver v. Ashman and they may conveniently be dealt with next. We then consider, in some detail, claims for pecuniary and non-pecuniary loss in claims both by living plaintiffs and under the Fatal Accidents Acts. In this connection we canvass the questions of actuarial evidence and inflation. As a separate head we treat losses incurred by others including family loss. Finally we deal with the mode of trial and the form of the judgment.

## (A) THE RULE IN OLIVER v. ASHMAN

### The present rule

52. In Oliver v. Ashman[37] the Court of Appeal decided that where a plaintiff's expectation of life is reduced he can only recover damages in respect of his future loss of earnings during the period he is likely to remain alive and that nothing may be awarded in respect of the further period he would probably have lived had it not been for his injury. The plaintiff was a boy, aged 20 months, who had suffered a serious brain injury causing him to become a low grade mental defective requiring constant care, control and medical attention. His expectation of life was reduced by about thirty years.

### Criticisms of the present rule

53. This decision has been much criticised[38] and, in Skelton v. Collins,[39] the High Court of Australia refused to follow it. In our consultations on Published Working Papers Nos. 19 and 27 it has been represented to us by some of those consulted, including the Bar Council, that the decision should be reversed by legislation.

54. In his judgment in Skelton v. Collins, Taylor J. stated

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37. [1962] 2 Q.B. 210.

38. See e.g. Street, "Principles of the Law of Damages", 1962, pp.49-51. Fleming, "The Lost Years: A Problem in the Computation and Distribution of Damages", California Law Review, Vol. 50, October 1962, pp.598-618.

39. (1966) 39 A.L.J.R. 480.

the objections to the rule thus:-

> "I need scarcely mention the anomaly that would arise if Oliver v. Ashman is taken to have been correctly decided. An incapacitated plaintiff whose life expectation has not been diminished would be entitled to the full measure of the economic loss arising from his lost or diminished capacity. But an incapacitated plaintiff whose life expectancy has been diminished would not. Yet the recovery by him of damages that does not take into account his full economic loss will operate to prevent his dependants, in the event of his death, from recovering damages under the Fatal Accidents Acts. However, if he dies without having sued for damages his dependants will be entitled to recover damages assessed upon a consideration of what his economic prospects would have been had he survived for the full period of his pre-accident expectancy."40

And, in Oliver v. Ashman itself, Holroyd Pearce L.J., whilst holding himself bound by authority, expressed the view that there was much to be said for allowing damages for loss of earnings during the lost years to be recoverable by a living plaintiff but that no such claim should be allowed to a deceased's estate. In Wise v. Kay, which was decided shortly after Oliver v. Ashman, Sellers L.J., whilst accepting the correctness of the decision itself, said:-

> "I would express with respect a doubt whether a claim for loss of earnings in the years by which life is shortened could never arise. If a man before an accident habitually put aside £500 a year from his earnings and there was every probability of his continuing to do so for X years ahead I do not at present, and without the matter being argued before us, see why the fact that he will only live by reason of the accident for X-5 years should deprive him when alive of compensation for the £500 he would have saved in each of the five lost years."41

55. The main criticism of the decision has been that it results in manifest injustice to the dependants of a plaintiff with a seriously reduced expectation of life and this has led us to examine alternative ways of dealing with such situations.

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40. Ibid., at p.491.

41. [1962] 1 Q.B. 638 at p.646.

Suggestions for altering the present rule

56. A number of suggestions have been made, all of which accept that compensation for loss of earnings in the lost years should be based upon the amount of such earnings less what the plaintiff would have spent upon himself.[42] A solution so based would not be in accordance with the principles generally applied in the assessment of compensation for future loss of earnings, which take no account of how the plaintiff will spend the money awarded. Furthermore, the plaintiff with no dependants who has been reduced to a physical and mental wreck, and who will spend the rest of his life of normal duration in a mental hospital with no expense to himself, would get the same compensation under this head as the man who will have to keep himself and his family out of his damages for the rest of a normal life-span. Nevertheless, it is our provisional view that the principle of earnings less living expenses ought to be accepted. The anomaly which arises in the exceptional case just mentioned where the totally incapacitated victim spends the rest of his normal life-span cost-free in a mental hospital should not be extended to the more normal case where the victim, although his life expectation has been shortened, has to keep both himself and his dependants out of his damages.

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42. This was the basis adopted in Skelton v. Collins above and is accepted by Professor Street in "Principles of the Law of Damages", 1962, pp.49-52 and by Kemp & Kemp, The Quantum of Damages, 3rd Ed., Vol. 1, 7th Cum. Supp., and notes to p.28. However, most American decisions compute future earning loss merely on the basis of the life expectancy the plaintiff would have had, and make no deduction for living expenses between the time of the plaintiff's death and the time he would have died if he had not been injured.

57. The suggestions which have been made are:-

(a) The reversal by legislation of the rule in Oliver v. Ashman and the adoption of the Skelton v. Collins test referred to at footnote 42 above. In the case of very young plaintiffs we would expect the awards to be small because of the impossibility of such plaintiffs establishing that they would, in fact, have made any savings from future earnings. In the case of mature plaintiffs with no dependants, compensation would depend upon whether a plaintiff could establish as a probability that he would have used his earnings during the lost years otherwise than upon himself. In both these cases the award, unless spent by the plaintiff himself, might result in a bonus for his estate and ultimate beneficiaries not dependent upon him at the time of the accident, nor perhaps at death. We do not, however, see this as unjust, particularly in the case of a mature plaintiff without dependants at the time of the accident; by reducing the plaintiff's expectation of life, the defendant has taken from him his ability to offer to anyone who might become dependent on him in the future any security during the lost years. In the case of plaintiffs with dependants at the time of the accident, the amounts would be substantial but there would be no certainty that plaintiffs, having obtained their awards, would, in fact, put that part of the total aside to provide for their dependants and, to this extent, the object of compensating the dependants might be nullified.

However, the fact that this would be the simplest solution and the one nearest in principle to the way in which damages are at present awarded (i.e. that the damages should be paid to the victim himself and not, by some process of claims linkage, to his dependants) may be thought to outweigh the risk of disadvantage for the dependants.

(b) The dependants might be permitted to bring an action under the Fatal Accidents Acts notwithstanding that the deceased had, in his lifetime, himself recovered damages. A number of difficulties would be presented by this solution. The limitation period would certainly have to be extended. After perhaps a considerable lapse of time the dependants might have difficulty in proving that the deceased had died as a result of the original accident. Under the present rules, it would be necessary to determine the extent to which the claiming dependants had benefited from the death. The defendant would have a potential claim hanging over him perhaps for years.

(c) If a plaintiff with dependants was able to join them in his action it might be possible to devise a system of compensation which would be fair to everyone. A sum of money would be awarded to compensate the dependants for what they would probably lose during the lost years. This money would be paid into Court where it would earn interest during the remaining years of the plaintiff's life (the interest would, of course, be taken into account in the computation of the capital sum). On his death it would go to his dependants in proportions

decided by the judge at the trial of the action. If the plaintiff lived longer than his prognosed expectation of life he ought to be allowed to apply to the Court for payment to him of some part of the sum in Court. He ought also to be allowed to apply to the Court for a variation of the way in which the disposal of the money had been ordered to take account of changes in the family situation such as the desertion of a wife, the marriage of a daughter whose expected dependency was thereby ended, or perhaps the addition of more dependants, e.g. by adoption. This proposal involves a drastic and perhaps unacceptable departure from the conventional system of awarding and administering damages. It would also have undesirable consequences in the case of plaintiffs who, as sometimes happens, have not been told of their lost expectation of life. Judges and counsel are well used to the exercise where medical considerations so demand, of keeping facts hidden from a plaintiff, but this would not be possible if the award itself was explicit. It would also complicate the settlement of claims. A plaintiff with a reduced expectation of life and dependent children would have to obtain the approval of the Court and the position of his wife would require protection also. However, cases in which the plaintiff has a reduced expectation of life are serious ones in which both parties to a settlement are likely to be legally represented and we do not think that, in practice, if the other administrative difficulties were overcome, it would be difficult to make provision by rules of Court for the

compromise of the claims on terms consistent with this proposal.

58. We have provisionally concluded that the rule in Oliver v. Ashman ought to be reversed. The proposals outlined in paragraph 57 above are made in the context of the present system of obligatory lump sum once-and-for-all awards. In a later part of this paper we examine periodic payments as an alternative to the lump sum award but, in the present context, we think that the choice must be between the first and third of the above proposals and we are not, at this stage, committed to either. There may be better suggestions from those we consult. We have, however, formed a strong adverse view of the second proposal.

(B) (i) LOSS OF EXPECTATION OF LIFE CONSIDERED AS NON-PECUNIARY LOSS

(ii) CLAIMS UNDER THE LAW REFORM (MISCELLANEOUS PROVISIONS) ACT 1934

Flint v. Lovell and Rose v. Ford

59. These two subjects are distinct but inter-connected. Loss of expectation of life as an independent concept first made its appearance in Flint v. Lovell.[43] In that case Acton J., in awarding damages to a 70 year old plaintiff, treated the shortening of his life as a head of damages separate from the mental suffering arising from knowledge of lost expectancy, and the Court of Appeal upheld his judgment. Shortly before Flint v. Lovell was decided, the Law Reform (Miscellaneous Provisions) Act 1934 had been passed whereby, in certain circumstances, causes of action vested in the deceased, survived for the benefit

43. [1935] 1 K.B. 354.

of his estate.

60. In Rose v. Ford[44] the House of Lords was required to decide both whether Flint v. Lovell was rightly decided and whether, if so, this head of damage was recoverable for the benefit of the estate. They answered both questions in the affirmative and, in dealing with the first question, Lord Wright said:-

> (A man has) "a legal interest entitling him to complain if the integrity of his life is impaired by tortious acts, not only in regard to pain, suffering and disability, but in regard to the continuance of life for its normal expectancy. A man has a legal right that his life shall not be shortened by the tortious act of another. His normal expectancy of life is a thing of temporal value, so that its impairment is something for which damages should be given."[45]

61. As Professor Kahn-Freund has pointed out, "Flint v. Lovell might have remained a decision of little consequence had it not been for the survival of the cause of action under the 1934 Law Reform Act".[46] In Rose v. Ford, the plaintiff died without recovering consciousness and, in later cases, damages were awarded where death was instantaneous. It is clear that, in such cases, nothing is given for the subjective element of knowledge of the loss. Equally clearly the victim does not himself benefit from the award. As was inevitable the awards of damages varied widely until, in Benham v. Gambling[47] the House of Lords laid down, in effect, a standard conventional sum of £200 which was later increased to £500 because of the decline in the value of money between 1941 and 1968.[48]

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44. [1937] A.C. 826.

45. Ibid., at p.848.

46. (1941) 5 M.L.R. 81 at p.84.

47. [1941] A.C. 157.

48. Naylor v. Yorkshire Electricity Board [1968] A.C. 529.

62. ..s a result of these decisions the same conventional award is made for loss of expectation of life whether the award is made to a living plaintiff or to the personal representatives of a victim who died as a result of his injuries, although, in the case of a living plaintiff, something may also be awarded for the subjective element.

The assessment of damages for loss of expectation of life

63. It has been suggested that, in the case of a living plaintiff, there should be no award of damages for loss of expectation of life, the main reason advanced being a dislike of arbitrary awards. On the other hand, it has been suggested that, so far from abolition, the law ought to be altered so that a Court would be required to consider all the elements in the case and make a rational estimate in each case of the value of the lost happiness. This would equate this head of damage to the other heads of non-pecuniary loss and, whilst it would not relieve the Courts of the task of fixing a scale within the framework of which damages for loss of expectation of life would be awarded, within that scale there would be room to choose a figure which, by comparison with other sets of circumstances, would be just. If, as Lord Wright said, "the normal expectancy of life is a thing of temporal value", that value must surely be different in a case where what has been lost is the prospect of a full and happy life and in one where the plaintiff's prospects of happiness were, in any event, gloomy.

Damages for loss of expectation of life should be retained but not as a conventional sum?

64. If the rule in Oliver v. Ashman is abolished the question canvassed in the previous paragraph will not be so pressing, but,

nevertheless, it is one which must be asked. We have formed no concluded view on this question save that awards in their present form of a conventional £500 are, in almost every case of a living plaintiff, irrelevant, because the seriousness of any injury causing lost life expectancy is so great that the damages awarded mask and swallow up the conventional figure. We, therefore, favour the abolition of an award of a arbitrary sum. We invite comment on this view and on what, if anything, should be put in its place if it was to be abolished.

No survival of a claim for loss of expectation of life?

**65.** The argument against the survival of a claim for damages for lost expectation of life to the estate of a deceased plaintiff is much stronger. Persons who have not suffered any loss are likely to get the benefit of the award, for instance, creditors of his estate; and, where there are dependants, the survival is of little importance because the award will generally be deducted as a benefit accruing to the dependants as a result of the death. The exceptional case where the award is of some importance is where a child is killed and the parents, on behalf of his estate, claim the conventional sum. Sometimes such an action may be brought to punish a tortfeasor and, insofar as this happens, we do not think it justified. More often, the recovery of this small sum may genuinely operate as some solatium for the loss; but, insofar as this is something for which the law ought to provide, we think it ought to be dealt with when we come to consider whether an award in the nature of a solatium ought to be admitted and this we do in paragraphs 198-203 below. It is also true that if claims for loss of expectation of life continue to survive, the Courts will be less likely to adopt a more flexible attitude towards the claims of living plaintiffs.

66. We have come to the provisional conclusion that claims for non-pecuniary damages for loss of expectation of life should not survive to the estate of a deceased victim.

A claim for other items of non-pecuniary loss should survive?

67. Where an injured person dies at once there cannot be vested in him any claim for non-pecuniary damages other than for loss of expectation of life. However, where he has survived his injuries for some time before dying, a claim for damages for pain and suffering and loss of amenity will be vested in him at his death. It has been suggested that these claims should not survive either but with this we do not agree. The deceased may have suffered severe pain over a considerable period before death and may even, during that time, have spent some of the damages he was advised he would recover; and, during this period, relatives may have so acted in looking after him as to be not undeserving of the reward he may have intended to bestow upon them. We can see no reason why, in justice, a victim's death, perhaps wholly unconnected with the injury, should lead to this compensation being taken away.

## (C) THE PRINCIPLES OF THE ASSESSMENT OF NON-PECUNIARY LOSS FOR A LIVING PLAINTIFF

### Introductory

68. The basis of the calculation of damages for pecuniary loss is plain; the basis of awarding damages for non-pecuniary loss is not. Damages given to compensate a victim by enabling him to purchase an artificial leg can be quantified; but, since one cannot replace a leg, or undo pain, suffering or grief, or restore to the victim the enjoyment of life, one cannot rationally value in money terms the non-pecuniary loss that the victim has suffered.

At present, if the injured person may, in the future, spend money on something that can make him forget the loss of his leg or his pain and suffering, or on some alternative to the amenities of which he has been deprived, such expense is not usually regarded as pecuniary loss, though it will be taken into account as an element in assessing the non-pecuniary loss.

The Courts' approach to the assessment of non-pecuniary loss

69. Damages for non-pecuniary loss are necessarily regarded as compensation, not restitution. The Courts have established the principle that the plaintiff is not to receive "the price of the injuries which he has sustained",[49] that is, the price that an uninjured man would willingly pay to avoid a given injury or the price that the injured plaintiff would willingly pay to be quit of his injuries. Damages calculated on either basis would be so high as to be socially unacceptable.

70. The fact that there is no other currently accepted objective test for the assessment of non-pecuniary loss available was well expressed by Sellers L.J. in Warren v. King:-[50]

> "No true value can be reached for there is nothing to establish it, as in the case of the value of goods, of the cost of production or a price reached by the process of supply and demand and the haggling of a market."[51]

71. It has many times been said that the assessment of damages for non-pecuniary loss is arbitrary and conventional. In West v. Shephard, Lord Morris of Borth-y-Gest explained how he saw

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49. Owen v. Sykes [1936] 1 K.B. 192 at p.198.

50. [1964] 1 W.L.R. 1 at p.8.

51. Cf. also Jenkins L.J. in Pietryga v. Shannon 1955 C.A. No.293 quoted in Kemp & Kemp, The Quantum of Damages, 2nd Ed., Vol. 1, p.214.

the matter:-

> "A money award can be calculated so as to make good a financial loss. Money may be awarded so that something tangible may be procured to replace something else of like nature which has been destroyed or lost. But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general methods of approach. By common assent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional."52

72. Broadly speaking, the level of damages is at present fixed by the consensus of judges, checked by the Court of Appeal. This consensus is based, again broadly speaking, on the level of other awards given by judges for comparable injuries. The process has been criticised on several grounds: that it is irrational, for the levels are arbitrary and there is no way in which one kind of injury or deprivation can be compared with another; that judges are the wrong persons to assess damages; that the present system produces awards which are too high or too low.

73. We must now identify those aspects of non-pecuniary loss for which the Courts award compensation. In Phillips v. The South Western Railway Co., Cockburn C.J. said that the plaintiff was entitled to compensation for:-

> "the bodily injury sustained; the pain undergone; the effect on the health of the sufferer, according to its degree and its probable duration as likely to be temporary or permanent;"53

These are the main heads of non-pecuniary loss (other than loss of

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52. [1964] A.C. 326, at p.346.

53. (1879) 4 Q.B.D. 406 at p.407.

expectation of life) and in modern terms they are usually referred to as pain and suffering and loss of amenity.

74. It is not the practice of the Courts to assess separate sums for pain and suffering and loss of amenity, and indeed it may be difficult to say in the individual case that one particular consequence of the injury falls under one head rather than the other. It is also worth noting that while the plaintiff's financial loss until trial is called "special damage", and is pleaded separately from "future loss", the award for non-pecuniary loss is never divided into past and future losses.

75. Awards for non-pecuniary loss are made in one lump sum; this makes it impossible to know what relative importance the Courts attach to the different elements of loss. But it is clear what elements are considered, and we are not aware of a single reported case where a judge has expressly refused to take account of any matter which could reasonably be regarded as a loss suffered by the plaintiff. As Lord Morris said in West v. Shephard immediately after the passage in his speech quoted in paragraph 71 above:-

> "In the process of assessing damages judges endeavour to take into account all the relevant changes in a claimant's circumstances which have been caused by the tortfeasor."

76. The pain and suffering for which the plaintiff is to be compensated includes all the pain directly caused by the injury (including fright, nervous shock and residual pain), the pain and suffering caused by operations or remedial treatment, and the like. Compensation is also made for a variety of unpleasant mental experiences: the consciousness of present disability and shortened life expectancy; fear of future incapacity; embarrassment or humiliation caused by disfigurement; and

hysteria or neurosis caused by the injury. Of the total award of £17,500 in West v. Shephard the sum of £2,500 was compensation for the plaintiff's consciousness of her condition.

77. "Loss of amenity" is a broad heading, and covers matters which would not in ordinary speech be regarded as lost amenities. It includes any temporary or permanent loss or impairment of function and any worsening of the plaintiff's health or vigour. The Courts will always look at the circumstances of the individual plaintiff: while a sedentary worker and an active outside worker might be awarded similar sums for comparable pain and suffering, a plaintiff who loses a leg may expect to recover more if his hobby is long distance running than if it is chess. If the plaintiff has lost a specific amenity, if he can no longer work in his garden, play football or the violin, he will be entitled to compensation for that.

78. Since West v. Shephard it is clear that compensation for the physical injury itself should be awarded, as well as for the consequential pain and suffering and loss of amenity. This is shown by the speeches of Lord Morris[54] (with whom Lord Tucker agreed) and of Lord Pearce.[55]

79. Perhaps the most important feature of the present law is that it regards life as worth living quite apart from any happiness or pleasure it may bring (see West v. Shephard;[56] also Upjohn L.J. in Wise v. Kaye[57]). It follows that any

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54. [1964] A.C. 326 at p.349.

55. Ibid., at p.365.

56. Ibid., at p.364.

57. [1962] 1 Q.B. 638 at p.662.

factor in the enjoyment of life is something for the loss of which the plaintiff is entitled to be compensated. Marriage, marital intercourse, children, work and, generally, being alive: all these are "amenities" recognised by the law.

80. In Wise v. Kaye, Sellers L.J. distinguished loss of amenities from loss of happiness and loss of enjoyment, and explained that the law did not compensate, except in the most general way, for the plaintiff's loss of happiness. He pointed out, as Lord Pearce also did in West v. Shephard,[58] that the plaintiff was entitled to damages even though she was just as happy after the accident as she had been before. On the other hand, in Wise v. Kaye,[59] Diplock L.J. argued that compensation is given for loss of happiness. This argument has become associated with another to the effect that where a plaintiff receives an award of damages for non-pecuniary loss, he is in truth being compensated, wholly or mainly, for his consciousness of the loss and not for the loss itself. It was the decision in Benham v. Gambling[60] dealing with the non-pecuniary loss occasioned by lost life expectancy which gave rise to this suggestion that in cases of personal injury the Courts should compensate for loss of happiness.

81. The question of extending the principle of Benham v. Gambling to cover a period during which the plaintiff, though still alive, remains wholly or nearly unconscious, arose in two leading cases. In the first of these, Wise v. Kaye, the

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58. [1964] A.C. 326 at p.368.

59. [1962] 1 Q.B. 638 at p.663.

60. [1941] A.C. 157.

plaintiff had remained unconscious throughout the period from the accident to the date of trial and the medical prognosis was that she would never recover consciousness (as indeed she never did). The judge awarded £15,000 for the plaintiff's general loss of amenities and £400 for her loss of expectation of life. The majority of the Court of Appeal (Sellers L.J. and Upjohn L.J.) upheld this award. Diplock L.J. would have reduced it to £1,500 for the plaintiff's 3½ years' unconsciousness to the date of trial, plus £1,000 for her loss thereafter. He said he regarded the differing sums awarded by courts for different disabilities as:-

> "an attempt by the court, imperfect though it must necessarily be, to assess the comparative extent by which the victim's pleasure, happiness and enjoyment of life is likely to be reduced by these respective kinds of injuries."61

Diplock L.J. considered that pain and disability could be equated only because each reduced the happiness of the victim. This he regarded as implicit in Benham v. Gambling. He saw no other difference between that case where the victim was unconscious and an ordinary case of physical disability than that the unconscious victim lost the sorrows of life as well as its joys, whereas in an ordinary case disability might result in a substantial balance of unhappiness, since the joys of life might be reduced, while the sorrows remained the same. After referring to the general level of awards, Diplock L.J. stressed the point that the plaintiff, having no consciousness of deprivation, and having been spared the pains and sorrows of life, had lost only the balance of happiness over unhappiness; and for that Benham v. Gambling had prescribed a modest figure. It should be noted that Diplock L.J. agreed that it was not a relevant question whether the plaintiff needed or could use the damages awarded to her, an opinion confirmed by the House of Lords in West v. Shephard.

61. [1962] 1 Q.B. 638 at p.665.

82. Shortly after the decision of the High Court in Wise v. Kaye, Paull J. tried West v. Shephard, a somewhat similar case, but one where the plaintiff appeared to have some traces of consciousness. The judge referred to the award in Wise v. Kaye, but thought that the plaintiff before him was worse off as she was to some extent aware of her condition. He awarded £17,500 general damages, and £500 for loss of expectation of life. The House of Lords upheld the award; but, for the reasons which will be summarised in the next two paragraphs, Lords Reid and Devlin dissented.

83. In his dissenting speech in West v. Shephard, Lord Reid distinguished two factors: what the plaintiff had lost, and what she must feel about it, the latter being more important. He did not see in Benham v. Gambling any general principle that damages should be assessed by balancing happiness and unhappiness. Lord Reid thought[62] that the case of a dead man and the case of an unconscious man were comparable to the extent that damages could give no real benefit or satisfaction to either of them. The relevance of consciousness he defined as follows:-

> "All that I would take from Benham's case is that in assessing damages on an objective basis, independently of what the injured person knew or felt, a low figure was taken. And that is some justification for taking a moderate figure for the objective element in a claim by a living person for loss of amenity and attaching more importance to what he knows and feels about his deprivation than to his actual injuries."[63]

On that basis Lord Reid thought that £5,000 was an appropriate sum for the plaintiff's physical injuries, and £6,000 for her consciousness of the deprivation.

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62. [1964] A.C. 326 at pp.341-2.

63. Ibid., at p.343.

84. We now turn to Lord Devlin's dissenting speech.[64] He agreed with what Diplock L.J. had said in Wise v. Kaye and thought that Benham v. Gambling was fundamentally on the right lines. He would not distinguish between sudden death and death preceded by unconsciousness; and if the probability were that the plaintiff could not use the damages awarded, this was a good argument for a modest assessment.

85. In Skelton v. Collins,[65] the High Court of Australia (Menzies J. dissenting) held, in deciding on the action of an unconscious plaintiff, that they proposed to follow Benham v. Gambling, and not West v. Shephard, which conflicted with it and ought not to be followed. The trial judge had awarded a modest sum for loss of amenity, but said that he would have awarded a larger sum if he had followed West v. Shephard. The judgments in the High Court of Australia show the various strands of reasoning which may tend to result in modest awards in such cases. Thus Kitto J. said that the sum awarded should be very moderate because the plaintiff was released from all liability to unhappiness; and he put special emphasis on the point that it was improper to place too high a value on what the plaintiff had lost, since one could not really form an idea of it. Windeyer J. thought that no award should be made if it could not be used for the plaintiff's advantage; but no other member of the Court agreed with him on this.

86. In Andrews v. Freeborough,[66] the first English case in

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64. Ibid., at p.362.

65. (1966) 39 A.L.J.R. 480.

66. [1967] 1 Q.B. 1.

which an action was brought by the personal representatives after the deceased (an 8-year-old girl) had been unconscious for a substantial period (nearly a year) before the death, the Court of Appeal (Winn L.J. dissenting) expressed great sympathy with the views of the High Court of Australia but felt bound by West v. Shephard. The trial judge had awarded £2,000 for the period of unconsciousness: the majority of the Court of Appeal did not think that this was excessive, although they rejected any suggestion that previous cases had set up a tariff of £2,000 a year for unconsciousness. Winn L.J. said that it was open to doubt whether the personal representatives could recover in the same way as the deceased would have done in her life; but in any case he would have held that £500 was sufficient compensation for the loss of a year of a child's life, the quality of which was not as highly developed and appreciated as that of an adult.

87. The question is what is the loss for which compensation is to be given. Is it the actual loss, the degree of which one would say that the plaintiff is worse off, or is it his consciousness of, and distress at, his loss? If compensation is given for the actual loss, how is that to be defined? Is it to be the injury, disability and loss of the opportunity to lead an ordinary life, with its good and bad times; or is it to be the degree to which the plaintiff is less happy than he was before the accident? If the touchstone is consciousness, broadly speaking, cases in which the plaintiff is wholly or nearly unconscious or in which he potters happily and moronically around the garden will receive comparatively low awards. If the test is loss, then it can be said of the unconscious plaintiff that he has lost all life's happiness and thus deserves a substantial

award even though he is not actually unhappy.

88. The great advantage of the present "loss" method of approach is that the Court can make a comparative assessment of the gravity of the plaintiff's injury. It can appeal to commonly held views when it finds that a plaintiff whose leg is severed above the knee is worse off than one whose leg is severed below it - and should receive more compensation. It does not have to decide whether he is unhappier as a result.

89. If a Court were to base its award of compensation for non-pecuniary loss upon an assessment of loss of happiness it might award no damages under this head to a man who had been blinded or crippled but had made the best of it. It is our provisional view that any test based on an assessment of loss of happiness should be rejected. There is great force in the majority view in Wise v. Kaye and West v. Shephard that it would be difficult to devise a workable method for assessing such a loss: the comparison of the plaintiff's pre-accident and post-accident (or future) states of mind would be speculative; any criteria for deciding what was the victim's state of mind would be speculative; any criteria for deciding whether a given state of mind counted as happiness, and to what degree, would be illusory. Furthermore (as Lord Reid agreed) it might be wholly undesirable to accentuate the extent to which it might pay a plaintiff to show himself ill-adjusted to the effects of his accident, and not restored to his ordinary outlook on life.

90. In Wise v. Kaye and West v. Shephard the Court of Appeal and the House of Lords were unanimous in holding that the damages should not be reduced because the plaintiff could not use them. But since much of the force of the arguments of the dissentients

in these decisions is based on the pointlessness of giving compensation which cannot be used by or on behalf of the plaintiff, we feel we should, in paragraphs 91-92 below, consider in rather more detail whether an award should be denied or reduced if the plaintiff cannot use it.

91. Prima facie it might seem unworkable to make an award turn on whether the plaintiff can use it. It would be necessary to distinguish between money which will not be used by the plaintiff (e.g. money awarded to a very rich man) and money which cannot be used for the plaintiff's benefit; there are also considerable difficulties in defining what is meant by "use". Is money "used" if it is bequeathed by will? Some might feel amply compensated by being able to leave money to their children or give it directly during their lifetime. Is it possible to draw a line between disposing of money by one's will or allowing it to pass under an intestacy; and does it make any difference if the plaintiff is in no condition to appreciate that his money is passing to relatives, or to the Treasury? It is our provisional view that the law should not take account of the fact that a plaintiff cannot use the damages awarded to him. Moreover, it has never been suggested that compensation should not be given for a plaintiff's loss of earnings if it could not be used for his benefit.

92. Even in cases of lack of consciousness there is no reason why the money should not be spent by the relatives in seeking to establish contact with the plaintiff and in helping him, where possible, to return to some form of life. We provisionally think it would be undesirable that speculation as to the plaintiff's exact level of consciousness should give rise to

large differences in the amounts of awards.

93. There are no strict rules of law governing the practice of the Courts, but only a number of broad principles, overlapping or contradicting each other in some cases. These appear to be:-

(a) The principle that awards must be "fair and reasonable".[67]

(b) The need for moderation is not inconsistent with damages being "full" or "adequate".[68]

(c) Certain attempts have been made by the Courts to get away from the vagueness of the test that awards should be "reasonable" and to suggest objective standards to fix the general level of awards. One was suggested by Diplock L.J.[69] that it is no use giving more damages than a substantial proportion of defendants could pay, since otherwise plaintiffs with the same injuries would not be treated equally. Some judges have in dicta[70] even referred to the possibility of heavy awards putting defendants out of business, but we have no reason to suppose that judges in general have allowed this consideration to influence their awards.

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67. See e.g. Sellers L.J. in Wise v. Kaye [1962] 1 Q.B. 638 at p.653 and Pearson L.J. in Oliver v. Ashman [1962] 2 Q.B. 210 at p.243.

68. See e.g. Sellers L.J. in Warren v. King [1964] 1 W.L.R. 1 at p.8 and in Wise v. Kaye [1962] 1 Q.B. 638 at p.650.

69. See Wise v. Kaye [1962] 1 Q.B. 638 at p.670.

70. See Brett J. in Rowley v. L. & S.W.Ry. (1873) L.R. 8 Ex. 221 at p.231, Cockburn C.J. in Phillips v. L. & S.W.Ry. (1879) 4 Q.B.D. 406 at p.407 and Greer L.J. in Heaps v. Perrite Ltd. [1937] 2 All E.R. 60 at p.61.

(d) It was also suggested by Diplock L.J.[71] that, since wealth beyond a moderate share does not increase happiness, there is no point in awarding compensation for loss of happiness beyond that moderate share.

(e) On the old dicta that compensation for pecuniary injury should be fair not full, Lord Devlin, in West v. Shephard, made the following comment:-

> "I think it means this. What would a fair-minded man, not a millionaire, but one with a sufficiency of means to discharge all his moral obligations, feel called upon to do for a plaintiff whom by his careless act he had reduced to so pitiable a condition?"[72]

This test, that the defendant should do whatever money can do to compensate the victim, is an approach to a definable objective test, but it requires that the Court should first identify a "fair-minded man, not a millionaire" and then discover his views on the matter.

(f) Yet another way in which the level of awards might be assessed on an objective basis has been suggested by Harman L.J. in Warren v. King viz:-

> "It seems to me that the first element in assessing such compensation is not to add up items as loss of pleasures, of earnings, of marriage prospects, of children and so on, but to consider the matter from the other side, what can be done to alleviate the disaster to the victim, what will it cost to enable her to live as tolerably as may be in the circumstances?"[73]

So long as the Courts have, without guidance, to arrive at an arbitrary figure to award for non-pecuniary loss

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71. See Wise v. Kaye [1962] 1 Q.B. 638 at p.670.

72. [1964] A.C. 326 at pp.356-7.

73. [1964] 1 W.L.R. 1 at p.10.

we provisionally think that as a "first element" this criterion is right.

94. The situation is summed up by the dictum of Lord Denning M.R. in Ward v. James where, in speaking of cases where a plaintiff is greatly reduced in his activities by reason of grave injuries, he said:-

> "He is deprived of much that makes life worthwhile. No money can compensate for the loss. Yet compensation has to be given in money. The problem is insoluble. To meet it, the judges have evolved a conventional measure."[74]

The judges as arbiters of non-pecuniary damages?

95. In their search for principles upon which to base this "conventional measure" it seems sometimes to have been forgotten that there is no principle, the application of which, will answer the simple question; what damages must be awarded for the loss of an eye? The answer to this question at present given is that the amount is what the judges think it ought to be and, if this fact is squarely faced, it leads inevitably to the question whether the judges are the proper people to fix the conventional scale.

96. In our consideration of this question we would not have it forgotten[75] that, particularly since the virtual disappearance of jury trial, the judges have achieved a high degree of uniformity which is a matter upon which we place great importance because the predictability of awards thus created facilitates settlements. Uniformity as Diplock L.J. pointed out in Hennell v. Ranaboldo,[76] is maintained by the existence of a consensus between judges and b

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74. [1965] 2 W.L.R. 455 at p.467.

75. See para. 9 above.

76. [1963] 1 W.L.R. 1391 at p.1393.

the Court of Appeal's power to alter a judge's award if it is out of line with current patterns. Judges and members of the Bar are also in the habit of discussing awards among themselves, and of regularly consulting certain publications which classify awards and make a wider selection of them accessible than do the Law Reports.

97. It is not, however, the uniformity of the scale with which we are here concerned but its content. As will appear when we come to consider possible alternative methods of trial[77] we are of the opinion that trial by judge alone is the best method of assessing damages for personal injury claims, largely because of the need for uniformity and predictability but also because judges can best weigh the evidence which is called not only to identify t injury and its prognosis but also, and usually more importantly, t distinguish it as less or more serious than the norm. It is, however, much less easy to see why the norm should be fixed by the judges in the first place.

A possible legislative tariff for non-pecuniary damages

98. It is at least arguable that it is for society, through the legislature, to fix what, in a system of law based upon fault, the compensation to be paid by tortfeasor to victim should be for an identifiable injury, and this has led us to consider whether we ought to recommend a legislative tariff directed to the general level of assessment of awards for non-pecuniary loss in respect of specified injuries or the loss of a specified faculty. The existence of such a tariff would not, of itself, give the answer for any given case and the determination of particular

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77. See paras. 209-217 below.

awards would be left, as at present, to the judges. What it would do would be to substitute, for example, a sum fixed by legislation for the present £3,500 norm[78] for the loss of an eye. It would still be possible by evidence and argument to demonstrate that the particular injury under review merited more or less compensation than the norm.

99. There is very little precedent in English law for such a tariff except, perhaps, the Industrial Injuries Benefit Schedule, but this Schedule does not purport to indicate compensation in the form of an award but merely indicates a percentage disablement related to loss of faculty. Furthermore, it is a Schedule which is intended to be applied by a medical board, which is not concerned with an assessment in money or with the particular amenities which the injured person has lost.

100. It is clear that it would be impossible to make a comprehensive tariff of awards for all different injuries. However, it should be possible to draw up a list which would avoid excessive rigidity and yet furnish a workable guide to the Courts. Much would still have to be determined by analogy and it would have to be made clear that the tariff was not intended to be cumulative but that, in the case of multiple injuries, the whole picture had to be considered, in relation, of course, to the tariff figures. It would, however, permit meaningful submissions as to the amount to be awarded and the giving in judgment of an indication as to the analogous relationship between the injuries suffered and the nearest tariff figure.

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78. Watson v. Heslop (1971) 115 Sol. J. 308 per Salmon and Sachs L.JJ.

101. The tariff could work in various ways:-

(a) by setting upper and lower limits;

(b) by indicating an average figure;

(c) by indicating a minimum figure.

Of these we rule out immediately a tariff with upper and lower limits for each injury. There is no injury the effect of which could not be aggravated by some other injury or its impact on some amenity central to the particular plaintiff's life; in such cases an upper limit might well work injustice. Similarly there could be cases, for example, where an already useless leg is lost because of injury, when any sensible lower limit would be too high.

102. If it were decided to have a legislative tariff our provisional view is that it should contain average figures. The effect of such a tariff would be that the sum indicated for each injury would be the compensation for that injury and its effects in an average case, a reasonable award for the ordinary plaintiff without any special features in his case. The judge would weigh the various factors in each case in order to determine whether the award should be above or below the average, and by what amount.

103. In a minimum tariff an indication could be given to the judge of the lowest award appropriate to a plaintiff, in the absence of exceptional circumstances, whatever his or her sex, age or habits. The discretion to award an amount in excess of the minimum would, of course, be unfettered. The difficulty we feel about this approach lies in the necessary qualifications as to exceptional circumstances.

104. Whether or not there ought to be legislative tariff depends upon the view one takes as to who ought to decide the conventional

scale. After the decision in Ward v. James,[79] which laid down that, save in exceptional circumstances, the Court should not exercise its discretion to allow a jury in actions for personal injury, a number of Members of Parliament put down a motion deploring the decision on the ground that, if it became even more difficult to obtain trial by jury, awards would remain standardised at too low a level, and there is undoubtedly a considerable body of opinion which feels that the judges have drawn the scale too low and are too reluctant to increase it to take account of the fall in the real value of money. We think that the best alternative, if one is thought necessary, to unguided judicial discretion on this aspect of damages is a legislative tariff, which could be automatically geared to the cost of living index. We have come to no final conclusion ourselves upon the desirability of such a tariff and invite comment upon this aspect of the paper.

The problem of overlap

105. There is one final matter which has recently become important in the consideration of non-pecuniary loss and that is the so-called overlap between the damages awarded for loss of amenity and pecuniary loss in the form of future earnings. In Fletcher v. Autocar and Transporters Ltd.,[80] Diplock L.J. pointed out[81] in regard to the amenities the plaintiff had lost that, to the extent that the value he placed upon them was in part reflected in the money that he spent on them, this was already

79. [1966] 1 Q.B. 273.

80. [1968] 2 Q.B. 322.

81. Ibid., at p.351.

provided for in compensation for his loss of earnings and to thi extent he had been awarded money in place of the amenities he would have spent it on; and he used this consideration to justi the damages awarded for pain, suffering and loss of amenity whic in his dissenting judgment, Salmon L.J. considered to be too low.

106. In his judgment Salmon L.J. expressed the opinion that an overlap of this nature would only be taken into account if the Court were proposing to add something to the normal compensation for a particular injury in respect of a particular loss of amenity.

107. This aspect of the inter-relation of heads of damage presents difficulties from the theoretical and analytical points of view but, in practice, we do not think that it has any substantial effect upon the conventional sums awarded for non-pecuniary loss, nor do we think that it ought to have. If the loss of a special amenity has the effect of increasing an award of damages for non-pecuniary loss above the conventional sum (as we think it can and should) we do not think it ought to be relevant to enquire what that amenity cost. The fell-walker and the fisherman should be equally compensated for their lost recreation although the fisherman may have spent large sums for a rod in a good trout stream.

The problem of overlap as treated in Smith v. Central Asbestos Co

108. However, in a very recent case, the Court of Appeal has applied the "overlap" principle in a rather different way. In Smith v. Central Asbestos Co.[82] there were seven plaintiffs who

82. [1971] 3 W.L.R. 206.

had all contracted asbestosis in varying degrees over long years of working for the defendants. Each was awarded damages which were itemised under two heads of "Loss of future earnings" and "Loss of amenities of life". The amounts awarded for loss of future earnings were calculated upon an arithmetical basis but the amounts awarded for loss of amenities were, in some cases, less than they would otherwise have been, because the amounts awarded for future loss of earnings were high. Two examples from the judgment of Lord Denning M.R.[83] show what was done:-

> "Smith is aged 44. He has severe and progressive asbestosis. He has not worked for four years and is not likely to work again. His expectation of life is six to eight years. The judge awarded these figures:-
>
> | | £ |
> |---|---|
> | Special damages | 2,888 |
> | Loss of expectation of life | 500 |
> | Loss of future earnings (at £1,325 a year) | 7,000 |
> | Pain and suffering, etc. | 6,000 |
> | Total | £16,388" |

> "Dodd is aged 55. He has severe asbestosis with severe disability and a moderate rate of progression. His expectation of life is six to eight years. He has a light job in the Home Office. He is unlikely to be able to work for more than three years. The judge awarded these sums:-
>
> | | £ |
> |---|---|
> | Special damages | 700 |
> | Loss of expectation of life | 500 |
> | Loss of future earnings (3 to 5 years at £367 a year and the last 3 years at £743 a year) | 4,500 |
> | Pain and suffering, etc. | 8,000 |
> | Total | £13,700" |

109. Both plaintiffs had severe asbestosis and both had the same expectation of life and yet Dodd received £2,000 more for

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83. Ibid., at p.216.

pain and suffering than did Smith, although Dodd (who was at least able to do light work) would seem to have been suffering less. The reason for this discrepancy appears plainly from a passage in the judgment of Lord Denning:-[84]

> "No question arises in any of the cases as to the special damages or the loss of expectation of life. The contest is only as to loss of future earnings during the "years of survival" and for the pain and suffering etc. (such as loss of amenities of life) during those years.
>
> Before I discuss these, I would say a few words about the severance of items of damage. In Watson v. Powles [1968] 1 Q.B. 596, and Fletcher v. Autocar and Transporters Ltd. [1968] 2 Q.B. 322, 336, we discouraged judges from taking the items separately and just adding them up at the end. But since Jefford v. Gee [1970] 2 Q.B. 130, the judges have to itemise the damages in order to calculate the interest. This does not mean that the total award is necessarily to go up higher on that account. The total award is still to be one which gives him a fair compensation in money for his injury. Care must be taken to avoid the risk of overlapping. Thesiger J. in this very case had thi point in mind. He intimated that a high figure for loss of future earnings might go in reduction of the award for pain and suffering and loss of amenities of life: and he found support for this in the only other asbestosis case which has come before the court: Sales v. Dicks Asbestos & Insulating Co. Ltd. (unreported) Roskill J., October 19, 1967.
>
> I think there is a good deal in this. When a man is stricken with a disease like asbestosis, it must be a comfor to him to know that he is getting full compensation for loss of his future earnings. It will do something to relieve hi distress on being put on light work or put out of action altogether. To that extent the award for loss of amenities may be reduced. The judge also pointed out that high wages often represent "danger money", so that compensation at thos rates includes compensation for risks which he no longer incurs when he is on light work.
>
> Turning now to the individual cases, the sums awarded by the judge were as follows:-

| | Loss of future earnings | Loss of amenities of lif |
|---|---|---|
| Smith | £7,000 | £6,000 |
| McCourt | £6,500 | £6,000 |
| Drake | £4,000 | £7,500 |
| Dodd | £4,500 | £8,000 |
| Roof | £1,700 | £2,000 |
| Raper | £4,500 | £6,500 |
| Sampson | £4,500 | £7,000 |

84. Ibid., at p.218.

> If you work out the figures for loss of future earnings, for the "years of survival", you will see that in many cases they are on the high side: but I do not think a complaint should be made on that score, seeing that a man gets nothing for his loss of earnings during the "lost years". I would not disturb the judge's figures on those heads."

Critique of Smith v. Central Asbestos Co.

110. It seems to us that the judgment of the Court of Appeal in Smith v. Central Asbestos Co. exposes a contrast between two possible views of the relationship between damages for pecuniary and for non-pecuniary loss. The first is that, although for the purposes of the calculation of interest the amounts for different heads of damage should be separately assessed, still one has to look to the overall situation of the plaintiff and the total sum awarded to him and to be aware that damages awarded under one head may have an effect on alleviating loss under the other. One of the claimed advantages of this method of approach is that similar injuries may receive a similar overall compensation, so that awards in cases where there is and is not substantial pecuniary loss do not come too much out-of-line with each other. The other possible view is to see it as more fair to treat compensation for pecuniary loss and non-pecuniary loss quite separately, and to see the purpose of the law of damages as that of making full compensation for the one and reasonable compensation for the other.

A solution to the problem of overlap?

111. We would welcome comment on the general desirability of the development of the law and practice of the Courts in accordance with the two possible views of the overlap problem discussed in the foregoing paragraph.

112. For our part, however, we feel that examination of the

judgments in Smith v. Central Asbestos Co. shows the subtlety and over-complexity which is required on the approach adopted by the Court of Appeal in that case. We think that in the attempt to do perfect justice there may be seeds of injustice.

113. Our provisional conclusion on how to resolve the problem of overlap as posed by the decision in Smith v. Central Asbestos Co. is that a better result is achieved by treating the assessment of pecuniary and non-pecuniary loss as independent of each other. On this approach we suggest that the damages should be assessed on the basis that the plaintiff is entitled to receive:-

(a) Compensation for his full pecuniary loss (subject, of course, to the recognised deductions and allowances).[85]

(b) And also compensation for his non-pecuniary loss in accordance with the recognised scale depending upon the nature of the injury.

Thus the global overall award should comprise the total sum arrive at by adding together the independent assessments of pecuniary and non-pecuniary loss.

114. In any particular case we can see no justification for reducing the award for non-pecuniary loss because the victim will also receive an award for his loss of earnings. The loss of a leg in terms of suffering and lost amenity is the same for a man with a high salary as for a low-wage earner (or for the victim such as a housewife who earned nothing) and both should, in principle, receive the same amount for their non-pecuniary loss. If the plaintiff, such as a housewife, is unable to prove a loss of earnings, we see no injustice in the award being limited to non-pecuniary loss.

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85. The principles for the assessment of pecuniary loss for a living plaintiff are discussed further in detail in Section (D) below.

115. Similarly we see no justification for reducing the amount assessed as the full pecuniary loss by the argument that the plaintiff, because he has received the full scale award for his suffering and loss of amenity, is saved the necessity of devoting part at least of his award for loss of earnings to providing himself with new amenities in place of those which he has lost. We can see no justification for reducing the award for loss of earnings by this process of reasoning. The victim who was earning good money before his accident could spend his earnings as he thought fit and he should be placed, by his award for pecuniary loss, in the same financial position with the same field of choice as to how he spent his money, as he was before the accident. It seems wrong that the award for loss of earnings should be assessed at less than full compensation because the plaintiff can be expected to limit his pre-accident spending habits in order to make good some part of the non-pecuniary loss of amenity inflicted on him by the tortfeasor.

116. There is one final point which is implicit in the provisional conclusions we have reached in paragraphs 114 and 115. We cannot help feeling that the present disposition of the Courts to reduce the damages in order to obviate the so-called problem of overlap is motivated to some extent by the feeling that there is, or should be, a scale of figures for the overall sums awarded in particular types of claim. We see no justification in logic or in justice for the existence of any pattern of overall awards as such. The amount comprising the overall award should not, in itself, be capable of arbitrary adjustment. It should only be such sum as represents the addition of the awards for pecuniary loss and non-pecuniary loss assessed independently of each other.

## (D) THE PRINCIPLES OF THE ASSESSMENT OF PECUNIARY LOSS FOR A LIVING PLAINTIFF

### Introductory: the principles of assessment and the method of assessment distinguished

117. In this section we deal with the principles and detailed rules for the assessment of pecuniary loss in a claim by a living plaintiff, and in Section (E) we do likewise with regard to the assessment of a claim under the Fatal Accidents Acts.

118. This approach will, we hope, lead conveniently to Section (F) where we discuss the important question of the method of assessment which is adopted by the Courts. The discussion in Section (F) will juxtapose the so-called "multiplier" method of assessing the capital value of the lump sum award and the method which can be advocated as a possible alternative to the multiplier, namely that of assessing the lump sum by means of a discount rate based upon actuarial techniques and actuarial evidence.

119. The discussion of the "multiplier" method and the "actuarial" method respectively is followed at the end of Section (F) by an examination of the extent to which inflation should be taken into account in the assessment of pecuniary loss, since the question of actuarial assessment and the problem of inflation are closely interlinked.

### The basic principle governing the assessment of pecuniary loss

120. A succinct statement of the basic principle with regard to the assessment of pecuniary loss is to be found in Mayne & McGregor on Damages as follows:-

> "The plaintiff can recover, subject to the rules of remoteness and mitigation, full compensation for the pecuniary loss he has suffered. This is today a clear principle of law."[86]

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86. 12th Edition at p.650.

121. The broad principle has indeed been established for a long time and was propounded by Lord Blackburn in Livingstone v. Rawyards Coal Company in the following terms:-

> "I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."[87]

122. The passage cited was quoted with approval by Earl Jowitt in a modern leading case on personal injuries:-

> "The broad general principle which should govern the assessment of damages in cases such as this is that the Tribunal should award the injured party such a sum of money as will put him in the same position as he would have been in if he had not sustained the injuries."[88]

123. It has, moreover, never been doubted that the above rule is of general application.[89]

Deductions for benefits received

124. As we have remarked in paragraph 24 above the calculation of a lump sum award sufficient to compensate the plaintiff for what he has lost and will have to spend has to take account of proper discounts and allowances. The Courts have long been troubled by the question whether a deduction should be made from awards for financial loss in respect of benefits received by the plaintiff, which he would not have received but for the accident

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87. (1880) 5 App. Cas. 25 at p.39.

88. British Transport Commission v. Gourley [1956] A.C. 185 at p.197.

89. See Winfield on Tort, 8th Ed., at p.679 and Kemp & Kemp The Quantum of Damages, 3rd Ed., Vol. 1 at p.4.

and which might be thought to mitigate the loss he has suffered. Such benefits include the proceeds of insurance policies, charitable contributions, disablement or retirement pensions, benefits from state insurance schemes and sick pay.

125. In the case of a living plaintiff, it has long been held that payment under insurance policies to an injured plaintiff cannot be taken into account in assessing his damages.[90] The same applies to payment made from charity or benevolence. At the other end of the scale it is not doubted that the plaintiff must give credit against lost wages for payments such as sick pay, and it was conceded in Parry v. Cleaver[91] that if the plaintiff had lost a pension he must give credit for such pension as he in fact is going to receive. The position of National Insurance Benefits is regulated by statute: s.2 of the Law Reform (Personal Injuries) Act 1948, provides that the plaintiff has to give credit for half of what he received over a five-year period. It seems to us that none of these cases needs discussion.

126. However, in claims by living plaintiffs, the Courts have found it more difficult to decide whether, when computing loss of earnings, to take into account pensions, Unemployment Benefits or what are now called Supplementary Benefits. In Payne v. Railway Executive[92] the Court of Appeal held that a Service pension was not deductible in assessing the plaintiff's loss. However, in Browning v. War Office[93] the Court of Appeal decided that a

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90. Bradburn v. Great Western Railway (1874) L.R. 10 Ex.1.

91. [1970] A.C. 1.

92. [1952] 1 K.B. 26.

93. [1963] 1 Q.B. 750.

"veteran's benefit" (in effect a Service pension) should be taken into account, although in subsequent cases it was held that where the pension was discretionary it should be ignored. Finally, in Parry v. Cleaver the House of Lords held that a pension, whether or not discretionary and whether or not contributory, should not be taken into account in assessing compensation for a plaintiff's lost earnings. We think the law should be left as it now is. The justification for the present rule is to be found in the fact that a contributory pension has in fact been paid for by the plaintiff himself and a non-contributory pension has likewise in effect been paid for by the plaintiff since his receipt of such a pension will have been reflected in a salary lower than that he might otherwise have earned.

127. For a personal injuries case, there is no Court of Appeal decision on Unemployment Benefits or Supplementary Benefits. In Parsons v. B.N.M. Laboratories[94] (a wrongful dismissal case) it was held that an Unemployment Benefit should be deducted in full, even though part of it might be regarded as the result of the plaintiff's thrift. This decision was followed at first instance in Foxley v. Olton,[95] a personal injuries case. However, in the same case it was held, following Eldridge v. Videtta,[96] that Supplementary Benefit was not deductible on the ground that it was

94. [1964] 1 Q.B. 95.

95. [1965] 2 Q.B. 306.

96. (1964) 108 S.J. 137.

discretionary. This seems not in fact to be so, but in any case the position will need to be reconsidered in the light of the speeches in the House of Lords in Parry v. Cleaver; since the discretionary element, if any, seems not to be relevant. In Hewson v. Downes[97] the judge following Parry v. Cleaver held that a state retirement benefit was not deductible.

128. It seems to us that there is no acceptable solution to these specific problems which is also entirely logical. The only consistently logical solution would be to take into account all benefits which would not have been received but for the accident; this, however, would involve deductions even for payments out of benevolence or charity, which were intended to make the victim better off, and would run up against deep-seated feelings of fairness. Scarcely less deep-seated in our opinion, is the feeling that no deduction should be made for payments resulting from the plaintiff's thrift and foresight. It seems to us that any solution must have some element of rough and arbitrary justice about it. This is recognised, for instance, in the Criminal Injuries Compensation Scheme which provides that where the victim has died the compensation is reduced by $^{4}/_{5}$ of the pension rights given or increased in value as the result of death on duty or in performance of a duty connected with the victim's employment. If there is no logical reason for choosing one solution for benefits received from the State rather than another, it seems to us that rough analogy and the desirability of certainty should be governing factors. There seems to us no reason why decisions on Unemployment and Supplementary Benefits should have to be appealed to the House of Lords, and we prefer to suggest a simple solution.

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97. [1970] 1 Q.B. 73.

129. In Parry v. Cleaver the House of Lords decided, in a partial analogy with the Fatal Accidents Act 1959, that the value of a pension should not be deducted from lost wages. We have come to the provisional conclusion that benefits received from the State (otherwise than as an employer) should also be treated by rough analogy and should be treated in the way laid down in s.2 of the Law Reform (Personal Injuries) Act 1948, the plaintiff being given credit for half of the Unemployment and Supplementary Benefits he receives over a five-year period. However, we think that to most people the State Retirement Benefits would be regarded as more analogous to a private pension, and the provisional view is that the decision in Hewson v. Downes should be given statutory force. We recognise that in the common case where both Retirement and Supplementary Benefits are received this would mean treating the two differently. But we see no practical difficulty in doing this.

Deductions for expenses saved

130. As we have remarked in paragraph 26 above a plaintiff's damages may be subject to a further deduction in respect of expenses which he has been saved, so long as they are in pari materia with his future expenses which are being compensated.[98] The deductions which in practice are made in respect of "expenses saved" usually do not represent a very significant factor in the final assessment and we see no reason for changing the present rule.

Deductions in respect of taxation

131. Of a different order are the deductions which have to be made to make allowance for taxation and to this subject we now

98. Shearman v. Folland [1950] 2 K.B. 43.

turn. Damages for personal injuries, even if they include an element of past or future loss of income, are not subject to income tax or capital gains tax. After some years of indecision the House of Lords settled in British Transport Commission v. Gourley[99] that the plaintiff in a personal injuries case was entitled to recover compensation only for so much of his lost income as would have remained to him after deduction of tax and, where appropriate, sur-tax.[100]

132. The Law Reform Committee in their Seventh Report[101] considered the general question whether the liability to tax of a person entitled to damages should be required to be taken into account in assessing the damages, but found themselves almost equally divided as to whether the law was satisfactory; those members who thought the law was unsatisfactory were themselves divided between those who thought that the damages should be taxable[102] and those who thought that tax should be disregarded altogether. The Committee, however, agreed in thinking that it might well become desirable to review the practical implications of the decision in Gourley's Case after a further lapse of time.

133. Finally, in Taylor v. O'Connor[103] the House of Lords applied Gourley in the context of the discount which has to be

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99. [1956] A.C. 185.

100. In the field of personal injuries the decision in Gourley's Case has been applied to National Insurance contributions in Cooper v. Firth Brown Ltd. [1963] 1 W.L.R. 418.

101. Cmnd. 501/1958.

102. Under the Finance Act 1960, ss.37 and 38, damages in excess of £5,000 for wrongful dismissal became taxable.

103. [1971] A.C. 115.

made for the receipt of lost future earnings as an immediate award; as the award is cut down because of the interest receivable on it, allowance must be made for the fact that that interest will bear tax.

134. It seems that in a case like Gourley, relating to taxation on lost income, the Court does take into account the plaintiff's other income and allowances, so as to calculate what tax he, in his particular circumstances, would have paid on the lost income.[104]

135. We see no reason for disagreeing with the House of Lords in its view that the incidence of tax on the interest earned by the sum awarded should be taken into account. It would be contrary to realities to ignore it, though it does add to the complexity of cases. As the speeches in Taylor v. O'Connor point out, in cases in which a particularly large discount is sought by the defendants because of the high rates of interest currently obtainable, one should also bear in mind the rate of tax which that interest would bear.

136. As for the main point decided in Gourley we think that there is no reason to recommend its reversal. Whether or not it would indeed come within our terms of reference under Item VI(b), to suggest that damages for personal injuries should be taxable, there has, so far as we have been able to tell, been no pressure for such a change.[105] While it continues to be the case that

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104. cf. Beach v. Reed Corrugated Cases Ltd. [1956] 1 W.L.R. 80

105. Such damages are expressly exempted from captial gains tax and ss.37 and 38 of the Finance Act 1960, now ss.187 and 188 of the Income and Corporation Taxes Act 1970, exclude payments for injury or disability.

tax would have been inevitably levied on the earnings which have been lost, and no taxes levied on the award of damages, we see no reason why someone who has lost a net sum should receive a gross sum. It seems to us that Gourley was correct in enunciating a basic principle of compensation for what the plaintiff has lost and there is no countervailing principle which would entitle the plaintiff to receive compensation for money which would never have been his to spend as he wished.

137. It is true that there is a case where the operation of the rule in Gourley's Case may be thought to produce an anomaly, namely the unusual one where the victim of the injury is a person with a large unearned income. In such a case the overall rate of tax assessable on the plaintiff's earned income (and hence on the award for his loss of earnings) will be abnormally high and the defendant will reap the benefit. We invite comments on whether this is a situation which calls for some change in the law, but we do not ourselves consider that this particular situation constitutes any strong case for altering the present rule.

Deductions in respect of National Insurance contributions

138. As regards allowance being made for National Insurance contributions, we are inclined to think that the decision in Cooper v. Firth Brown Ltd.,[106] whereby these contributions are deducted, should continue to be applied.

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106. [1963] 1 W.L.R. 418.

It seems right in principle, and as we have said, not to cause any great difficulty in practice. We are aware that in December 1964 the former Lord Chancellor agreed with the Trades Union Congress that the law in this respect should be changed, but we do not think that it works unfairly.[107] We have one reservation on this point: it may be that there are cases in which the loss of contributions have adversely affected entitlements to benefits, and we should be grateful if those we are consulting could draw any such cases to our attention. Strictly the possibility of such effects should be taken into account by the trial judge in assessing future pecuniary loss, but if such cases are frequent it may be that the change for which the Trades Union Congress has asked, i.e. that no deduction should be made in respect of National Insurance contributions, would be more generally fair in practice.

## (E) THE PRINCIPLES OF ASSESSMENT OF DAMAGES IN CLAIMS UNDER THE FATAL ACCIDENTS ACTS 1846-1959

### The nature of the statutory claim

139. The rights of dependants to claim damages depend entirely upon statute, but the statutes, whilst laying down a number of rules as to how particular aspects of claims must be dealt with, give no guidance as to the general principles upon which the damages are to be calculated. The Courts have laid it down that the right of each dependant "is based on the

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107. See Trades Union Congress Annual Report 1965 at pp.188-189.

reasonable expectation of pecuniary advantage from the continuance of the life of the deceased".[108]

140. The usual way in which this pecuniary advantage is assessed is exemplified by Lord Wright's dictum in Davies v. Powell Duffryn Associated Collieries:-

> "The starting point is the amount of wages which the deceased was earning, the ascertainment of which to some extent may depend on the regularity of his employment. Then there is an estimate of how much was required or expended for his own personal and living expenses. The balance will give a datum or basic figure which will generally be turned into a lump sum by taking a certain number of years' purchase. That sum, however, has to be taxed down by having due regard to uncertainties, for instance, that the widow might have again married and thus ceased to be dependent, and other like matters of speculation and doubt." 109

Three comments must be made on this dictum:-

(a) The number of years' purchase is decided by reference to how long the dependency would have lasted and is reduced to allow for the fact of the immediate receipt of a lump sum.

(b) The Courts frequently start not from the amount of wages but from the contribution to the household, deducting the amount required for the deceased's maintenance.

(c) The Court frequently fixes the multiplier after taking contingencies into account and not before.

141. Questions as to the method of calculation adopted by the Courts are dealt with in Section (F) where we consider actuarial evidence and the problems arising from inflationary tendencies

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108. Per Erle C.J., Pym v. Great Northern Railway (1863) 4 B. & S. 396.

109. [1942] A.C. 601 at p.617.

in the economy. In Section (J) we deal with the desirability of permitting alternative types of award to lump sum payments and this discussion also, of course, is relevant to Fatal Accidents Acts claims. In this part of the paper we are concerned only with matters which are peculiar to this class of claim.

The apportionment of the award between the dependants

142. The "usual and indeed the almost invariable practice"[110] is for the Courts to calculate the lump sum first and then apportion it among the claimants. However, the Act of 1846 provides that "the jury may give such damages as they think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought", and, in one of the first leading cases under the Act,[111] the Court calculated separately the awards to each of nine dependants, and stressed that the remedy was not given to a class but to individuals and, throughout the nineteenth century, juries regularly calculated each award separately; in 1941, the Court of Appeal recognised that either method was permissible.[112] The reason why the lump sum method is always adopted is because the Courts believed it to be simpler and not because the law requires it.[113]

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110. Per Paull J. in Jeffrey v. Kent County Council [1958] 3 All E.R. 155 at p.157. In Eifert v. Holt's Transport Co. Ltd. [1951] W.N. 467, C.A., Singleton L.J. said that this was "always" done.

111. Pym v. Great Northern Railway (1863) 4 B. & S. 396.

112. Per Luxmoore L.J. in Yelland v. Powell Duffryn Associated Collieries Ltd. (No.2) [1941] 1 K.B. 519.

113. See Street "Principles of the Law of Damages" p.150.

143. It is this method which has led to the practice adopted by the Courts in cases where the class of dependants includes children. The lump sum is first calculated and most of the total awarded to the widow leaving only small "nest-egg" sums for the children. The usual justification for this method of division is that the widow will maintain the children, but, if this is so, it can pertinently be asked, what is the basis of any award to the children?

144. By s.5 of the Law Reform (Miscellaneous Provisions) Act 1971 the control by the Court of a widow's damages where the claim is also made on behalf of her children is abolished, and this will, we think, make it essential for each child's damages to be fully computed, and for the sum awarded to represent a full assessment of the child's separate loss of dependency. Such sum will then, of course, be placed under the control of the Court and used for the child's maintenance. This will, undoubtedly, lead to a substantial increase in the amounts awarded to children, and we consider that it is right that it should do so.

The Law Reform (Miscellaneous Provisions) Act 1971

145. The Law Reform (Miscellaneous Provisions) Act 1971 further provides that in assessing damages payable to a widow in respect of the death of her husband there shall not be taken into account the remarriage of the widow or her prospects of remarriage.

146. In Reincke v. Gray[114] the Court of Appeal held that by virtue of the Matrimonial Proceedings (Children) Act 1958, and the Matrimonial Proceedings (Magistrates' Courts) Act 1960, a

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114. [1964] 1 W.L.R. 832.

stepfather was under a legal duty to provide for the maintenance and education of children who had become part of his family and consequently, in assessing damages to which the deceased's children were entitled, it was relevant to take account of the fact that their mother had remarried and that their stepfather was able and willing to provide for them as fully as had their father.

147. This Court of Appeal decision means that when a widow brings an action under the Fatal Accidents Acts in respect of her damages arising from her late husband's death and in respect of her children's damages, her remarriage or her prospects of remarriage must be taken into account in connection with the latter award and this is not affected by the Law Reform (Miscellaneous Provisions) Act 1971. It also means that the very enquiries and cross-examination relating to the widow's prospects of remarriage which the 1971 Act prevents in regard to her own claim will be permissible in regard to the claim of her children.

148. If sums awarded to children continue to be of the "nest-egg" variety it is unlikely that a defendant will seek to rel upon a widow's remarriage or prospects of remarriage, but the release from control of the widow's damages ought clearly, as we have shown in paragraph 144 above, to lead the Courts in future to adopt the second method of computation open to them. And if award to children become substantial it is difficult to see how the Court could fail to take into account the fact that, at the time of trial, the child was already provided with a stepfather or, indeed, was likely soon to be so provided. It is our provisional view that the 1971 Act ought to be amended to

prevent this anomaly.

149. A widower has a claim under the Fatal Accidents Acts in respect of the expense of employing a housekeeper to perform the services which his wife performed during her lifetime. In assessing this type of claim account is taken of the widower's prospects of remarriage.[115]

150. Some of the arguments which induced Parliament to make irrelevant a widow's remarriage or chance of remarriage can be advanced as strongly in the case of a widower's claim, although it is true that public opinion might be less shocked by an enquiry into a man's prospects of remarriage than into a woman's. We do not, however, think that this possible difference of attitude is sufficient to justify making a distinction between the sexes and, accordingly, it is our provisional view that the 1971 Act should be further extended to cover a widower's claim.

Deductions from damages received under the Fatal Accidents Acts

151. We do not think it necessary to deal at any length with the question of deductions from damages received under the Fatal Accidents Acts. In most cases the principal plaintiff is the widow, and the position is already regulated by statute in that the Fatal Accidents Act 1959[116] provides that in calculating the damages no account shall be taken of any "insurance money, benefit, pension or gratuity which has been or will or may be paid

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115. See e.g. Rowe v. Tasker and Another quoted in Kemp & Kemp, The Quantum of Damages, 2nd Ed., Vol. 2, p.190.

116. Section 2 of the Fatal Accidents Act 1959 replaces the Fatal Accidents (Damages) Act 1908 which dealt only with sums paid under contracts of insurance.

as a result of the death". "Benefit" in this context means benefit under the National Insurance Acts. Before 1959 no account had been taken of National Insurance Benefits or sums paid or payable "under any contract of insurance or assurance"; and no clear line of principle could be drawn between cases in which a widow was merely paid a sum coming from an employee's contribution and those in which there had been a contract of insurance, and so all such payments were excluded. We have met with no criticism of the working of the 1959 Act and we see no reason why it should be altered.

152. The 1959 Act does not, however, affect deductions from Fatal Accidents Acts damages of benefits derived from the estate of the deceased. Where, as frequently is the case, the bulk of the estate consists of the matrimonial home, no account is taken of it, but where the estate consists of cash or stocks and shares, the accelerated value of the widow's gain from the estate is taken into account. And this is done even where it was likely that the plaintiff would have received the benefit of the money or property at a later date and where the support lost had not derived from that money or property. It is arguable that in most families the wife could have enjoyed at least some of the benefit of the money or property during her husband's lifetime, had she wanted to or had she needed to. In any event, we think it unfair that the widow of a deceased who has saved by buying shares should be penalised whereas, had he purchased life insurance, she would have been protected. It is our provisional view that the 1959 Act should be extended to exclude all benefits derived from the estate of the deceased. It is open to question whether any exceptions should be made to this extension, e.g. an

identifiable portion of the estate of the deceased which derived solely from his inheritance by the will or intestacy of another person. We invite comments on the matters raised in this paragraph.

The class of recognised dependants

153. At present only persons within the prescribed family group are entitled to claim. Clearly there may be people outside this group who were dependent upon the deceased. In Published Working Paper No. 19 (paragraphs 60 and 61) we canvassed the question whether the class of relatives should be extended to cover these cases but those whom we consulted directed little attention to it. Of course, there would be difficulties of social policy as well as of definition in any such extension and purely commercial associations would have to be excluded, but we think that such an extension is worth further consideration and we should welcome views upon it.

154. There remains one respect in which, in our view, a change in the class of recognised dependants may be desirable. As the law stands children who have been legally adopted are within the class of dependants who are entitled to claim under the Fatal Accidents Acts, whereas children who have been de facto adopted and as such maintained by the deceased are not. It is our provisional view that children who have been treated by the deceased as members of his family (other than "boarded out" children) should be treated as dependent for Fatal Accidents Acts purposes.[117] We think the justification for treating them as

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117. cf. Matrimonial Proceedings and Property Act 1970 s.27 (1).

dependants is every bit as strong, if not stronger, than for so treating step-children, who are already recognised as dependants under the Fatal Accidents Acts.

## (F) THE METHOD OF ASSESSMENT OF PECUNIARY LOSS: TAYLOR v. O'CONNOR - ACTUARIAL EVIDENCE

### Introductory

155. Having dealt in Sections (D) and (E) with the principles and detailed rules for the assessment of pecuniary loss in claims by a living plaintiff and under the Fatal Accidents Acts, we would now turn, as forecast in paragraph 118 above, to the important topic of the method adopted by the Courts for assessing the capital value of the lump-sum award.

156. In preparing this section of our paper we have been greatly assisted by information and advice supplied to us by a small Working Party of the Institute and Faculty of Actuaries on the Assessment of Damages in Personal Injury cases and we acknowledge our great indebtedness to the members of the Working Party.

### The use of the multiplier as the normal and primary method of assessment: Taylor v. O'Connor

157. By reason of the views expressed by the majority of the House of Lords as recently as January 1970 in Taylor v. O'Connor[118] there is now no room for doubt as to what is the normal and primary method to be used for assessing the capital value of a lump sum award and as the Law Lords went out of their way to give their opinion upon this basic question it is

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118. [1971] A.C. 115.

desirable to quote the speeches in some detail:-

(a) Lord Reid said:-

> "Damages to make good the loss of dependency over a period of years must be awarded as a lump sum and that sum is generally calculated by applying a multiplier to the amount of one year's dependency. That is a perfectly good method in the ordinary case but it conceals the fact that there are two quite separate matters involved - the present value of the series of future payments, and the discounting of that present value to allow for the fact that for one reason or another the person receiving the damages might never have enjoyed the whole of the benefit of the dependency. It is quite unnecessary in the ordinary case to deal with these matters separately. Judges and counsel have a wealth of experience which is an adequate guide to the selection of the multiplier and any expert evidence is rightly discouraged. But in a case where the facts are special I think that these matters must have separate consideration if even rough justice is to be done, and expert evidence may be valuable or even almost essential. The special factor in the present case is the incidence of income tax and, it may be, surtax."[119]

(b) Lord Morris of Borth-y-Gest said:-

> "The learned judge was disposed in the present case to take ten as the multiplier. He varied it to 12 because he considered that the present era is not one of stable money values. I would not regard that as a valid reason. Nor would I think that ten need be considered as unreasonably low in the present case. Learned judges have a range of experience in these matters and in a realm where there are many imponderables and where mathematical accuracy is not possible the recognised methods of approach have proved rational and workable. In fixing a multiplier judges do the best they can to make fair allowance for all the uncertainties and possibilities to which I have earlier referred. It may well be that in cases where high figures are involved courts could derive assistance from skilled evidence concerning ways in which a sum of money could be used and managed to the best advantage. Such evidence should, however, only afford a check or a guide. It could not resolve those matters which in the nature of things must be uncertain or decide those issues to which the art of judgment must be directed."[120]

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119. Ibid., at p.128 D-E.

120. Ibid., at p.134 A-C.

(c) Lord Guest said:-

> "The next question is what has been conveniently described as 'the multiplier' which will convert the loss of support into a lump sum of damages. The judge applied a multiplier of 12 to the figure of £3,750 resulting in a total of £45,000 under this head. It has been suggested that a more precise method of arriving at the extent of the loss would be to obtain actuarial figures as to what sum would be required, based on the widow's expectancy of life, to purchase an annuity of the extent of the loss. This method has been disapproved in the past and never adopted except as a very rough guide. Its adoption would depend on current rates of interest and would not allow for inflation. If it were adopted it would have to be discounted in respect that it provides certainty and does not allow for contingencies. I would not be in favour of its adoption for this or any similar type of case. This method would require actuarial evidence which would increase the length and expense of trials and would unduly complicate matters which might have to be considered by juries ..... I return then to the 'multiplier'. The aim of this exercise is to provide a figure which is proportional to the injury resulting from the death. It is not to provide such a sum as would at current rates of interest leave the widow with the income she has lost. This would put her into a better position than she would have been apart from the death because at the end of the day she would still have the capital sum left. It is anticipated that the capital will be gradually reduced over the years to provide her support. In my opinion, the multiplier is intended to provide in a rough measure adequate compensation for the loss sustained. No precise method can be expected. It is well hallowed in practice and depends in some measure on the expertise of judges accustomed to try cases."[121]

(d) Finally, Lord Pearson, in whose speech is to be found the most specific description of the approved

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121. Ibid., at p.135 C-H.

multiplier method of assessment, said:-

> "The general method adopted by the learned judge in assessing the damages was in line with the normal practice in assessing damages under the Fatal Accidents Acts, though certain adjustments had to be made for special features of this case.
>
> There are three stages in the normal calculation, namely, (1) to estimate the lost earnings, that is, the sums which the deceased probably would have earned but for the fatal accident; (2) to estimate the lost benefit, that is, the pecuniary benefit which the dependants probably would have derived from the lost earnings, and to express the lost benefit as an annual sum over the period of the lost earnings; (3) to choose the appropriate multiplier which, when applied to the lost benefit expressed as an annual sum, gives the amount of the damages, which is a lump sum.
>
> In my opinion, the judge was fully justified in following the normal practice. It is desirable for the sake of uniformity and certainty that the same general method should be employed for assessing damages in fatal accident cases, whenever it is reasonably possible to do so, adjustments being made for special features in particular cases. It is useful, especially where large sums are involved to bring in calculations by other methods as ancillary aids for the purpose of checking the appropriateness of the amount of damages which has been arrived at by employing the normal method with or without adjustments. But I do not think that actuarial tables or actuarial evidence should be used as the primary basis of assessment. There are too many variables, and there are too many conjectural decisions to be made before selecting the tables to be used. There would be a false appearance of accuracy and precision in a sphere where conjectural estimates have to play a large part. The experience of practitioners and judges in applying the normal method is the best primary basis for making assessments."[122]

158. The importance of the foregoing speeches lies not merely in the views which the Law Lords expressed about the multiplier method of assessment but in that they went out of their way to juxtapose to the "multiplier" method the alternative method of assessment - what we will call the "actuarial method", whether

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122. Ibid., at p.140 C-G.

this involves the giving of expert evidence by an actuary or the use by the Court of actuarial tables. It is moreover significant that the opinions given in Taylor v. O'Connor supporting the multiplier method of assessment rather than actuarial assessment, while intended to apply to all types of personal injury claims, were expressed in the context of a Fatal Accidents Act claim where it might be thought that the multiplier method is less obviously appropriate - in contrast to the actuarial method - than in a personal injury claim.

159. Quite apart from the authority which attaches to Taylor v. O'Connor, it must be noted that the speeches in that case have subsequently been supported in the strongest possible terms by the Court of Appeal in Mitchell v. Mulholland (No.2).[123] In the light of Taylor v. O'Connor and Mitchell v. Mulholland (No.2) the prevailing judicial view must be taken to be:-

(a) The use of the multiplier has been, remains and should continue to remain, the ordinary, the best and the only satisfactory method of assessing the value of a number of future annual sums both in regard to claims for lost dependency under the Fatal Accidents Acts and claims for future loss of earnings or future expenses.

(b) The actuarial method of calculation, whether from expert evidence or from tables, continues to be technically relevant and technically admissible but its usefulness is confined, except perhaps in very

123. [1971] 2 W.L.R. 1271. For judicial views expressed in similar terms see also Watson v. Powles [1968] 1 Q.B. 596; Fletcher v. Autocar and Transporters Ltd. [1968] 2 Q.B. 322 and S. & Another v. Distillers Co. (Biochemicals) Ltd. [1970] 1 W.L.R. 114.

unusual cases, to an ancillary means of checking a computation already made by the multiplier method.

160. Prior to the decision in Taylor v. O'Connor we believe there had been an observable tendency for the Courts increasingly to receive actuarial evidence in substantial claims. In the light of what has now been said by the House of Lords, there seems to be the possibility, to put the matter at its lowest, that parties will be discouraged from calling actuaries as expert witnesses and that although actuarial tables will be used their use will be restricted.

161. Another effect which appears to flow from the entrenchment by the House of Lords of the "multiplier" as the sole method of computation is that it will become extremely difficult for the Courts to deal with and to be seen to deal with the problem of inflation. The speeches in Taylor v. O'Connor of Lord Morris of Borth-y-Gest[124], Lord Guest[125] and Viscount Dilhorne[126] appear to have established that, in any event, an adjustment of the "multiplier" is not the proper method of allowing for inflation. We will return specifically to the problem of inflation in paragraphs 177-190 below.

162. We cannot help feeling that the entrenchment, as we see it, of the "multiplier" by Taylor v. O'Connor is unsatisfactory. The "multiplier" is in many cases an extremely blunt instrument. A process of valuation which involves plaintiff's counsel flying a kite of, say, 12 and the defendant's counsel flying a kite of,

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124. [1971] A.C. 115 at p.134A.

125. Ibid., at p.136A.

126. Ibid., at p.139F.

say, 10 and the judge splitting the difference, is unlikely to commend itself indefinitely and there is a considerable body of opinion within the profession which views it as less than fair to plaintiffs in a substantial number of cases. It is, therefore, highly desirable to examine whether the present position can be improved. This in turn suggests that the merits of the actuarial approach to assessment, which was rejected by the House of Lords in Taylor v. O'Connor, and the weight which should be attached to actuarial evidence duly tendered, at least merits re-examination and to this we now turn.

The possible effects of actuarial evidence not being tendered

163. In terms merely of figures it is not clear how awards have been affected by the absence of actuarial evidence. In this context and as we have remarked elsewhere (see paragraphs 32-33 above) any comparative examination of awards faces the enormous difficulty that the failure to itemize damages under separate heads means that in the vast majority of cases the essential basis of comparison is lacking. Nonetheless, Professor Street has concluded from his own researches that whereas in Fatal Accidents Acts claims the average level awards is about 10% below actuarial estimates based on loss of contribution, in personal injury cases awards for loss of earnings are far below the actuarial valuations, in two cases which he cites by more than 50%.[127] It may be that the position has improved since. Mr. David Kemp in the latest 3rd Edition of Kemp & Kemp, The Quantum of Damages, has had calculations made on the basis of the tables which are there reproduced and concludes that on a sample

127. Street, Principles of the Law of Damages, 1962, pp.131-132.

of eight cases there is a good correspondence between the figures obtained by actuarial calculations and the actual awards.[128] Even so, in one case out of the eight, actuarial calculations showed a purchase of 14.4 years whereas Lord Denning M.R. regarded 10 years' purchase as reasonable.

164. Quite apart from the general pattern of awards it can hardly be gainsaid that arithmetically defective calculations are made and erroneous estimates are accepted by the Courts in individual cases. For the litigant concerned the individual case is all-important and we believe that such errors as we have instanced can be minimised by actuarial assistance.[129]

165. In any event it is significant in our submission that, as represented to us by the Joint Working Party, the actuarial profession has reason to regret the prevalent attitude of the legal profession and of the Courts towards actuarial expertise.[130] In the next following paragraphs, we accordingly discuss the ways in which actuaries themselves consider the Courts could receive greater assistance from actuarial evidence in the assessment of damages.

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128. Kemp & Kemp, The Quantum of Damages, 3rd Ed., Vol. 1, pp.37, 39, 40-51.

129. A striking example of such an error is that quoted by Mr. J. H. Prevett, F.I.A., in paragraph 34 of a paper on the Assessment of Damages which he submitted to the Institute of Actuaries on 22nd April 1968 where he instanced that a judge will sometimes include death as a contingency in making a deduction from an estimate of the annuity value or from an assessment based on the expectation of life. (See Journal of the Institute of Actuaries (1968) Vol.94, Part III, No.399, pp.293-315.)

130. And it should not be overlooked that there are a number of countries where actuarial evidence is used to a greater or lesser extent, viz. Eire, Republic of South Africa, the United States of America, Canada and - in Australia - South Australia.

166. Nothing which follows, however, is calculated to suggest that the judge is concerned other than with the particular case before him or to detract from his liberty to find the facts upon which the instant case has to be decided and to judge the relevance and weight of every kind of expert evidence (including that of an actuary) which may be presented to the Court. Nonetheless, it is pertinent to draw attention to the considerable help that the Court may derive, in any particular case, from statistical evidence and its interpretation by an actuary and we would now propound the factors which are relevant to achieving an improvement in the present practice of the Courts.

The nature of actuarial evidence

167. At the outset it must be stressed that actuarial evidence, even if properly used and appreciated, can never be more than an aid to assessment, albeit an aid which is more helpful than is often supposed.[131] The nature of the expertise employed by actuaries is the ability to calculate the present capital value of a series of future payments dependent on human life and other contingencies. As the starting point for his calculations the actuary requires to be supplied by others (it will normally be the plaintiff's legal advisers) with the basic data relevant to the case of the claimant concerned. Some of such data will be undisputed facts, e.g. the age and sex of the claimant and the amount of the pre-accident earnings. Other data will necessarily be assumptions, e.g. the rate of hypothetical

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131. It may be instructive to compare the value attached to actuarial computation in Chancery matters: see Lord Blackburn in McDonald v. McDonald (1880) 5 App. Cas. 519 at pp.539-540.

earnings and the chances of promotion. Armed with this data the actuary proceeds to make his calculations of the present value of the future losses on the basis of probabilities. In assessing the probabilities and in arriving, as a matter of professional opinion, at his valuation, the actuary uses such statistics as he thinks appropriate in the particular case. How far an actuary can himself be regarded as a competent expert witness in regard to these probabilities and these statistics and other data upon which the calculations in his report are based is a matter which is further discussed in paragraphs 168-171 below and in Appendix 4.

168. Actuarial calculations are based on the validity attaching to the Theory of Probabilities or the probabilistic approach and in Appendix 4 will be found an explanation of the significance and working of that theory; it is an essential element in the proper understanding of how actuarial evidence can assist the assessment of damages in any particular case.

169. It is, of course, conceded that no amount of actuarial evidence can show with arithmetical certainty what the particular plaintiff will lose. What then would be the advantages of its regular use?

170. There do seem to be grounds for arguing that the attempt to ensure that the assessment has a relation to the arithmetic has considerable value.[132] First, if the Court has to take a general view of complicated matters, it is inevitable that from time to time some substantial error will take place; it will be recalled that both Professor Street and Mr. Kemp seem to have discovered

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132. See Diplock L.J. in Whittome v. Coates [1965] 1 W.L.R. 1285 at p.1293.

such cases. A continuing effort to calculate as accurately as possible the plaintiff's financial loss might prevent such errors. Secondly, it is possible that over the years certain approaches become Court practice and then, long before they are abandoned, are rendered out of date, for instance, by an increased expectation of working life, or by variations in rates of interest.

171. The main disadvantage of a system in which actuarial evidence is regularly used would be the extra cost. If a case were fought out there might be two actuaries required: if, as seems likely, their evidence would in some cases turn on findings of facts by the judge, there would have to be adjournments or the actuary would have to value the plaintiff's hypothetical or actual earnings on a number of hypotheses. In practice they might have to be present throughout the case. If there is a difference of opinion between the actuaries the Court might be faced with a very difficult technical question to be decided on the evidence. Even in the cases which are settled the use of two actuaries to report on the situation of the plaintiff would appreciably add to the costs.

A new approach to the use of actuarial evidence

172. Clearly, the calling of actuarial evidence could not be made compulsory even in those cases with a substantial loss of earnings where it is pre-eminently desirable. The problem is how it can be encouraged. In the present situation created by Taylor v. O'Connor it seems unlikely that there will be any spontaneous change in the practice of the Courts in the direction toward actuarial methods of assessment becoming more acceptable. This leaves some form of legislative provision as the only means

by which an improvement could be brought about. If the legislation could be devised in a form which would at least lift the present inhibitions against the use of actuarial methods, two positive improvements could ensue. First, parties and their legal advisers would not be inhibited from tendering and the Courts would not be inhibited from listening to actuarial evidence expertly given. Secondly, in cases where the tendering of expert evidence would be inappropriate or too costly, encouragement would be given to the parties and to the Court to obtain such assistance as is possible from the use of actuarial tables.

173. In connection with actuarial tables we should mention that in Working Paper No. 27 we set out certain ideas in this respect. However, these ideas were formulated before the speeches in Taylor v. O'Connor and we realise that they will have to be reconsidered. Nevertheless we still consider that in cases where the pecuniary loss is not very high and where the probable future annual loss is reasonably regular, such tables can be of assistance to both counsel and the Court. While tables in a text book can be used by counsel, there may well be difficulties in persuading a Court, reluctant to turn to actuarial techniques, to accept them. It is, therefore, our provisional view that notwithstanding the recent decisions we have referred to, there would be a useful purpose to be served by the issuing of such tables on some official basis so that their accuracy and evidential weight could not be challenged.

A possible legislative provision

174. In the formulation of any legislative provision aimed to promote the use of actuarial methods in the process of assessment,

the following factors are highly relevant:-

(a) For a number of reasons the actuarial process is not suitable or practicable as the sole method of computation.

(b) There is no point in legislation dealing with the relevancy or the admissibility of actuarial evidence because there is little doubt notwithstanding Taylor v. O'Connor that it is admissible.

(c) Legislation cannot possibly deal with cogency as such.

175. However, we do consider that the present position is unsatisfactory. We do feel that this leads to injustice to so plaintiffs and that the position would be improved by altering the climate. The present climate is to all intents and purpos that actuarial evidence will not be used and actuarial tables will be little used. We want actuaries to be called in a substantial number of cases and we want actuarial tables to be relied upon to a greater extent. Is it possible for a section in a statute to say this?

176. We believe that a solution could be found in legislation on the following lines and upon this suggestion we would be particularly grateful for comments, viz.:-

"In any action under the Fatal Accidents Acts or for damage for personal injuries where the plaintiff claims compensation in respect of a future annual loss or future annual payments or expenses (i.e. loss of dependency, loss of future earnings or loss of future expenses), the plaint shall be entitled to rely upon the evidence of actuaries a upon approved actuarial tables to an extent which the Cour

considers appropriate to the particular case[133] and the Court shall pay such regard to such evidence and to such tables as it considers just in the circumstances of the particular case."

Allowance for inflation

177. In the context of what we have said above about the actuarial approach to assessment we now turn to the problem of allowing for inflation in the assessment of lump-sum awards. As we mentioned in paragraph 119 above these two matters are interlinked and it is convenient to consider them together.

178. The possibility of allowing for inflation is a matter which raises the question not of reducing the assessment of pecuniary loss but, possibly, of increasing it. There has been some hesitation in the Court as to whether the possibility of inflation should be taken into account in the assessment of lump-sum awards; there has also been disagreement rather than discussion as to the right way of doing it, if it is to be done.

179. Looked at from the point of view of compensation, inflation is merely one of a number of ways in which the earnings of the injured plaintiff or of the deceased might have increased; he might have been on an incremental scale, or have had promotion prospects, or there might have been general rises in wages. If these last were merely to keep up with rises in prices not giving any additional benefit in real terms, they might be described as an effect of inflation, though obviously no clear distinction can ever be drawn in any case.

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133. The discretion as to actuarial evidence would no doubt be exercised upon the Summons for Directions.

180. Looked at from the point of view of the needs of the plaintiff or of the deceased's family, the effects of inflation may be to make an award insufficient to meet them, whatever may have been the case when it was made.

181. It has long been argued that the right way to protect those who benefit by an award from the effects of inflation is by prudent investment of the damages and this argument continues at the present time to find favour in the House of Lords as appears from the speech of Lord Pearson[134] in Taylor v. O'Connor. On this approach the Court has to look at the problem from the point of view of needs, not of compensation. To deal with inflation as a matter of compensation inevitably gives rise to great difficulties of prediction. What will be the rise in the rate for the job which the plaintiff would have been pursuing but for his injury insofar as that rise does not represent any real benefit to the worker? Clearly, one does not in practice ask so complicated a question: if a trial takes place some time after an accident, evidence is given of what the plaintiff would be earning now without any effort to try and allocate any intervening increases between inflationary and real increases.

182. In Taylor v. O'Connor the trial judge increased the multiplier he would otherwise have applied to the average annual loss in order to take account of inflation. A majority of the House of Lords said that he was wrong to do so, but did not say that he was wrong to consider it at all. Our understanding of the general practice is that Courts and counsel make reference to rising wage levels in assessing the plaintiff's annual loss.

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134. [1971] A.C. 115 at p.143.

There is, of course, no attempt to quantify this element and there is thus no way either to rebut or support any suggestions that the Courts take insufficient notice of inflation.

183. If there were a periodic payments scheme in force there could be provision for variations in the light of changes in the cost of living without making the scheme much more complicated. We consider the desirability of such a scheme in Section (J) where it will be seen that, at any rate prior to consultation, we entertain substantial doubts about this.

184. On a lump-sum basis there is great difficulty in establishing not so much the likelihood of inflation, which seems to be expected, but that it will continue at any given rate. In S. & Another v. Distillers Co. (Bicchemicals) Ltd.[135] (the thalidomide case) Hinchcliffe J. ruled the evidence of an economist as to the likelihood of continuing inflation at the rate of 6% inadmissible as speculation and hearsay. Subsequently in Mitchell v. Mulholland (No.2)[136] another case in which an economist was called to give evidence on possible future inflation, the Court of Appeal went out of its way to lay down that such evidence should usually be regarded as inadmissible and is, in any event, to be discouraged. Edmund Davies L.J. expressed the Court's views

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135. [1970] 1 W.L.R. 114.

136. [1971] 2 W.L.R. 1271.

in the following terms:-

> "There may conceivably be rare cases where 'solid evidence' [a phrase quoted from a judgment of Chief Justice Barwick of the Supreme Court of Australia] regarding a particular plaintiff would enable the court to embark upon a more informed exercise regarding the likely impact of inflation on his future. But the present is certainly no such a case, and it must respectfully be said that the elaborately prepared material presented to the court on this topic therefore served no useful purpose. Care obviously needs to be exercised lest future trials may be similarly prolonged by its presentation. But all that this court can now do is to declare the irrelevance of material of so general and speculative a character and to rely on the profession not to seek to introduce it in future."[137]

185. It is difficult to visualise evidence which would establish that inflation will continue for a period of, say, 10 or 15 years at no less and no more than a given rate, no matter what political or economic changes may take place and we have some sympathy with the views recorded in paragraph 184 above. Whilst we do not see any reason why this sort of expert evidence of opinion should be categorised as hearsay we prefer, as we show in paragraph 190 below, a different approach to the problem of inflation which is not based upon speculation as to the future.

186. It is undoubtedly difficult to see how the Court can make allowance for inflation and be seen to do so unless the Court is prepared to give due weight to the actuarial method of assessment discussed in paragraphs 167-173 above and to hear with sympathy the evidence of an actuary. At the moment, for a judge using the multiplier method, the House of Lords has ruled in Taylor v. O'Connor against his increasing the multiplier to take account of inflation, and it seems to us that it will be

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137. Ibid., at p.1283A.

difficult for a judge without actuarial assistance to make allowance for the probability of inflation by any other method.

187. It emerges from our discussions with the Institute and Faculty of Actuaries that there are two ways of taking inflation into account. The first is to present figures in which the present value is obtained by discounting at the actual rate of interest currently available on secure fixed-interest stocks or on an appropriate mixed fund, but by increasing the loss for each future year by the percentage established by an economist or otherwise. The second is not to increase the annual future average loss, but to discount at a lower rate, being the rate receivable on good growth equities, on the theory that the difference between this rate and the current fixed interest rate represents the market estimate of the extent of future inflation. In either case the selected discount rate should be the net rate after deduction of tax so as to reflect the rule in Gourley's Case and not the gross rate.

188. The latter course is in effect though not in words what was suggested by Lord Diplock in Mallett v. McMonagle[138] and it is perhaps wrong to regard him, as does Lord Reid in Taylor v. O'Connor,[139] as actuated by nostalgia. This course relieves the Courts of the burden of having to decide what the rate of inflation will be, and is in line with Lord Pearson's suggestion in Taylor v. O'Connor[140] for checking (not for establishing) the

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138. [1970] A.C. 166.

139. [1971] A.C. 115 at p.129 G-H.

140. Ibid., at p.143A.

total award made, that one should see in how many years the award would be exhausted if the fund was earning a net 3%-4%.

189. The economist in the thalidomide case gave evidence that the growth yield on equities had lagged behind inflation and would continue to do so. The experience of 1970 has shown vividly both here and in the United States, how prices and wages can go up and the stock market down simultaneously. Nonetheless if one uses arithmetical calculations at all, the course we have discussed in paragraph 188 above is perhaps the easiest and most practical way of making an allowance for inflation even though it may be argued that the allowance so made is insufficient.

The solution to the question of allowing for inflation?

190. In the result we have tentatively concluded that a satisfactory answer is capable of being found to the question of allowing for inflation and also to the allied question of the Courts being more ready to adopt the actuarial method of assessment if the matter were approached on the following lines:-

(a) The right answer does not lie in Parliament imposing a solution to the problem of inflation as such by any kind of legislation.

(b) For the moment we consider that the most acceptable way of tackling the question of inflation is that suggested by Lord Diplock in Mallett v. McMonagle[141] of assessing the damages on the basis that the plaintiff will be able to invest them at the rate receivable at the date of award in good growth equities. If this is done,

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141. [1970] A.C. 168.

prudent management can, or, at least, more adequately can counteract the future inflation. Lord Diplock suggested a gross rate of 4%-5%, Lord Pearson a net rate of 3%-4%, but upon any given date the current percentage is easily capable of ascertainment.

(c) If we are right in our conclusion under (b) above, one final important conclusion follows. The approach of both Lord Diplock and Lord Pearson to the problem of inflation involves the process of assessment being conducted by the application of the current rate of interest obtainable on growth equities: this is tantamount to saying that the process of computation involved should be done by the application of a discount-rate and this in its turn implies a method for computing damages based on an actuarial approach, as we have argued above, and not on the traditional "multiplier" approach.

(d) Accordingly, ignoring entirely the possible assistance which, say, the evidence of an economist might be able to give on the question of inflation, we believe that the present practice of the Courts in allowing for inflation could be improved if a greater effort was made to compute the damages on the basis of a discount-rate, which in turn implies a greater readiness to follow actuarial methods as an alternative to the hit-or-miss application of the traditional multiplier. We, therefore, believe that, if there were acceptance of our suggestion in paragraph 176 above for a

legislative provision obliging the Courts in appropriate cases to have due regard to actuarial techniques, this would not merely overcome the defects of the "multiplier" method as such but also go a considerable way to enabling the Courts, by the application of an appropriate net discount rate, to give weight to future inflation when assessing the lump-sum award.

(G) LOSSES INCURRED BY OTHERS

Published Working Paper No. 19

191. In paragraph 2 we pointed out that some of the topics discussed in Published Working Paper No. 19 fall naturally for discussion in the wider context of this paper. In paragraphs 46-87 of the former paper we made provisional proposals for the abolition of the archaic actions for loss of consortium by a husband in respect of the society and services of his wife and for loss of services by a parent in respect of a child. In the light of our consultation on Working Paper No. 19 we have now decided that we ought to recommend the abolition of these actions and their replacement by a new legislative provision for the recovery of damages in proper cases of pecuniary loss suffered by members of the family and by other persons.

192. In Working Paper No. 19 we dealt with what we called "family loss" under six heads and with reference not only to claims by living plaintiffs but also to cases where loss is caused to others by someone's death. In consultation upon this paper Mr J.A. Jolowicz, Fellow of Trinity College, Cambridge, has pointed out that it is an over-elaboration to deal with the matter under six heads and that this arrangement obscures rather than clarifies the issue of principle. The true distinction is,

as he points out, between "Losses incurred by others on the victim's account" and "Losses incurred by others on their own account" and, in this paper, we propose to treat the question under these two headings. Two important heads of pecuniary damage incurred by others on their own account have already been dealt with. In paragraphs 52-58 above, in our consideration of the rule in Oliver v. Ashman, we have dealt with loss suffered by others when a victim's life expectancy is reduced, with consequent future pecuniary loss to his dependants. In paragraphs 139-154 we dealt with claims for loss of dependency under the Fatal Accidents Acts.

Schneider v. Eisovitch

193. In Schneider v. Eisovitch[142] the plaintiff was injured in a road accident in France, her husband being killed in the same accident. Her brother-in-law and his wife flew to France in order to accompany her home to England. Paull J. held that she was entitled to recover the £110 expenses incurred in this way and said:-

> "In my judgment, strict legal liability is not the be-all and end-all of a tortfeasor's liability. A plaintiff cannot claim a sum of money because he would like to pay a friend for his services. That would alter the character of the services given. The services must be treated as friendly services given freely by a friend. But to pay out-of-pocket expenses in respect of necessary services freely given does not alter the character of the services. I do not think the test is whether there is a moral duty to pay. Before such a sum can be recovered the plaintiff must show first that the services rendered were reasonably necessary as a consequence of the tortfeasor's tort; secondly, that the out-of-pocket expenses of the friend or friends who rendered these services are reasonable, bearing in mind all the circumstances including whether expenses would have been incurred had the friend or friends not assisted; and, thirdly, that the plaintiff undertakes to pay the sum awarded to the friend or friends."[143]

142. [1960] 2 W.B. 430.

143. Ibid., at p.440.

194. In Gage v. King[144] the above decision was dissented from by Diplock J. since he regarded it as an essential condition that a plaintiff should be under a legal liability to pay the expenses of the third party before he could recover such expenses; moreover, there has, as yet, been no decision by the Court of Appeal upholding the judgment of Paull J. However, in our provisional view, the effect of the decision in Schneider v. Eisovitch and the three criteria on which Paull J. based his acceptance of the claim produced a fair result.

Losses incurred by others on the victim's account

195. Under this heading we include all heads of damage in respect of which the victim could himself have recovered if someone else had not helped out. These heads of damage are, more or less easily, capable of direct translation into money terms. Examples of such heads of damage are:-

(a) Gifts made to the victim for his maintenance during incapacity or for medical or other expenses incurred as a result of the accident. Such payments are by present practice disregarded in the assessment of the victim's damages and we do not think that any change in this practice is called for.

(b) Attention, rendered necessary by the injury, provided by someone to whom the victim is not legally obliged to pay a wage. A husband, for example, is so injured that he is in need of constant attention at home: he could employ a nurse and recover the cost but, instead, the attention is given by his wife. This does not mean

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144. [1961] 1 Q.B. 188

that the husband has not suffered the relevant item of damage but only that the item cannot be reduced to a specific sum and claimed as "special damage" or as a quantified future continuing loss. If the wife has had to give up her work to attend to her husband, the financial loss to the family may be either greater or less than the cost of employing a nurse, depending upon whether the wife's lost wages are greater or less than those of the nurse. The husband should be entitled to recover either what he would have had to pay a nurse or his wife's actual loss of wage, whichever is the less.

(c) Services which the victim rendered to the family before the injury and of which the family is, by the injury, deprived. A wife, for example, is so injured that she is unable any longer to do any housework or to care for her family and extra help has to be employed. Loss of this kind is frequently thought of as being a loss to the husband and not to the wife. This seems to be out of keeping with present views as to a housewife's status and we think that, in her own action, the wife should be able to recover damages because of this particular aspect of her disability. The damages would be assessed by reference to the actual disbursements made or future disbursements anticipated so long as these did not exceed what was necessary to replace the lost services.

(d) Services performed voluntarily by members of the family involving no additional expenditure. In Working Paper

No. 19 we envisaged the situation where the other members of the family rally round and undertake the domestic duties formerly performed by an injured wife. We see no reason why, in such a situation, the injured wife should not recover damages on account of this genuine family loss. Quantification should present no real difficulty because a maximum figure is ascertainable by reference to what it would have cost to obtain equivalent services by contract and, to the extent that the "rallying round" was necessary, this cost would represent the actual loss.

(e) Visits to the victim. One of the results of injury, whether the victim is in hospital or ill at home, is a deprivation of social intercourse and, as we said in Working Paper No. 19, "an injured man should be entitled to receive visits". If this be right he should be entitled to recover the reasonable cost of arranging them, whether or not they can be regarded as contributing materially to his recovery. We think it is clear that recovery under this head must be strictly limited to what is reasonable; the cost of a son's journey from Australia to visit a father with a broken ankle must clearly be irrecoverable. In Working Paper No. 19 we suggested that recovery should be limited "to the reasonable cost (both in out-of-pocket expenses and loss of earnings) of such visits as were to be expected in the natural course of events having regard to the extent of the victim's injuries and his family circumstances". Some such test seems to have met with

the approval of those whom we consulted and we adhere to it.

196. The examples of loss incurred on the victim's account given in paragraph 195 above are not intended to be exhaustive and it is our provisional view that there should be a general legislative provision for recovery of such losses with particular legislative reference to the examples dealt with specifically in the previous paragraph.

Losses incurred by others on their own account

197. The Fatal Accidents Acts provide a statutory exception to the general principle that injury negligently caused to A or the property of A whereby damage is caused to B is not actionable by B. Where A is killed his dependants can sue, but where A is merely injured they cannot. In our consideration of Oliver v. Ashman we have pointed out that, where injury results in loss of life expectancy, this rule causes hardship to the victim's dependants and we have expressed our opinion that this rule should be abolished and have suggested a number of ways in which this present injustice can be remedied. In cases where the victim's expectation of life is not affected, the extent to which his dependants suffer pecuniary loss in consequence of his injury is, normally, directly dependent upon the extent to which his earnings are reduced and his expenses increased and, as he can recover damages on account of this loss, we do not think that any change in the law is called for.

198. Apart from the pecuniary loss suffered by others on their own account, there are undoubtedly situations in which they may be said to have suffered further loss, although such loss is incapable of rational assessment in money terms. A

husband's deprivation of his wife's society (or vice versa) and a child's deprivation of a parent's love and care are real losses as is the grief suffered by the members of a victim's family and his friends when he is killed or injured. The only[145] non-pecuniary losses of this type at present recoverable in English law are the husband's loss of his wife's society included in a claim for damages for loss of consortium[146] and, indirectly, the method of compensating surviving relations by the survival to a deceased's estate of a claim for damages for loss of expectation of life. Both these losses are quantified at small conventional sums.

199. The proposals we have made in paragraphs 191 and 65 of this paper will, if implemented, result in the abolition of the husband's right of recovery of non-pecuniary loss in respect of the loss of his wife's society and, indirectly, the solatium sometimes represented by the survival to a deceased's estate of his claim for damages for loss of expectation of life. It calls, therefore, for careful consideration whether anything, and if so what, should be put in their place. We are clearly of opinion that if anything replaces these two methods of recovering damages it ought to be more widely and rationally based, so as to include, for instance, a wife's claim as well as a husband's.

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145. Preston v. Hunting Air Transport [1956] 1 Q.B. 454 where a small conventional sum was awarded to young children for their non-pecuniary loss caused by the death of their father in an air crash must be regarded as of dubious authority.

146. In Cutts v. Chumley [1967] 1 W.L.R. 742 the husband was awarded a conventional sum of £200 for loss of his wife's society but, because he engaged and planned to continue engaging a paid housekeeper, he was also awarded £5,000 for loss of services.

200. Legislation which merely made recovery of damages for non-pecuniary loss (including grief) available to members of the family of an injured or deceased person would probably result in the award of small conventional sums. This is the situation in Scotland where a "token award of a few hundred pounds in recognition of, rather than as compensation for, the grief suffered at the death of a relative"[147] is given. We doubt whether this would be a satisfactory solution to the problem.

201. Another objection to leaving it to the Courts to decide what damages to award for non-pecuniary loss of this nature was made by some of those whom we consulted. They point out that it would lead to a very unsatisfactory type of litigation and we can do no better than quote the words of the Bar Council:-

> "There will undoubtedly be cases in which widows will be put forward as grief-stricken, when this is wholly untrue. With substantial sums at stake, defendants will feel obliged to probe the evidence and, perhaps, to employ inquiry agents in an attempt to test the truth of the allegations."

202. We agree with the objections adumbrated in the two last paragraphs. There is an alternative method of compensating these losses by means of a legislative tariff. This is the method adopted in South Australia where the Wrongs Act 1936-1959 provide for the payment to parents on the death of a child of an amount not exceeding £500 and to a surviving husband or wife on the death of a spouse of an amount not exceeding £700.

203. It is our provisional view that non-pecuniary loss of this kind ought not to be recoverable but that, if it were felt that

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147. Professor D. M. Walker, Q.C., LL.D, in his "Notes on Scots Law as to Reparation for Personal Injuries" prepared for a Colloquium on Damages in Personal Injury Cases of the U.K. National Committee on Comparative Law.

there should be some compensation payable by way of solatium or in compensation for the sort of non-pecuniary loss here under consideration, then the amount of such compensation should be fixed by legislative tariff.

Whose losses ought to be recoverable - losses incurred by others on the victim's account?

204. The principle behind the suggested claims for loss incurred on the victim's account is that, if the victim were in sufficient funds, he could compensate those who suffered the loss himself; he could pay for his own hospital expenses, a wage to those who helped him and the expenses of his visitors. This being so, we see no reason for restricting these claims to losses incurred by members of the victim's family. Subject to the overriding requirement of reasonableness we think that the losses should be recoverable whether they were incurred by a member of the family or a close friend or even a charitable stranger.

Whose losses ought to be recoverable - losses incurred by others on their own account?

205. As we have mentioned in paragraph 192, we have dealt earlier in this paper with claims for pecuniary loss represented by a claim for loss of dependency under the Fatal Accidents Acts and by the claim we propose should replace the present rule in Oliver v. Ashman. It remains to decide who should be allowed to make a claim for the sort of non-pecuniary loss referred to in paragraph 198. For such a claim, if it is to be allowed at all, our provisional view is that the class of claimants should be limited at least as strictly as the class of dependants under the Fatal Accidents Acts.

How and by whom should the claims be made?

206. In Working Paper No. 19 a number of different ways were suggested as to how and by whom claims for losses incurred by others on behalf of the victim should be made. Similar questions arise

in our consideration of compensation for the "lost years", though there the amounts involved will usually be substantially greater than those we are here considering. We do not favour any system of linked claims and think that this type of loss should be recoverable in the victim's own action. This may create a problem in a few cases if the plaintiff does not recoup his benefactor out of his damages. In Dennis v. London Passenger Transport Board,[148] Denning J. directed that money paid to the plaintiff by the Board and his employers should be repaid to them by the plaintiff out of the damages which he was awarded. There may be some doubt as to whether in awarding a lump sum damages to a plaintiff, a Court has any power to give directions as to its disposal and, for the avoidance of doubt, it is our provisional view that, where claims of this nature are included in a plaintiff's claim, the Court should by legislation be given power to give the necessary directions as to the disposal of damages recovered under these heads. Of course, insofar as compensation under these heads relates to future loss no direction is necessary: the award of damages enables the plaintiff to compensate his future benefactors and if he is not prepared to do so, then his would-be benefactors can withdraw their benefactions and he will have to replace their services from other sources.

207. We appreciate that this solution may occasionally raise difficulties in cases which are settled, but in the great majority of cases the plaintiff will be receiving compensation for loss sustained by those near and dear to him and we think it would be altogether too cynical to suggest that this is likely to be a real problem. Of course, if claims by way of solatium for non-pecuniary loss were admitted these would have to be brought by the person suffering the loss himself.

148. [1948] 1 All E.R. 779.

## (H) THE MODE OF TRIAL FOR THE DETERMINATION OF CLAIMS

### Introduction

208. The main point which has concerned us under this heading is whether an improved method can be devised to arrive at the level of damages. One such method in regard to non-pecuniary loss, a legislative tariff, we have discussed in paragraphs 98-105 above. We now turn to some alternatives which involve the interposition of the lay element in the machinery of the trial.

### Jury trial?

209. We have already in this paper[149] stressed the importance whi we attach to the fact that the Courts, by the measure of uniformity in their awards, have made the quantum of damages reasonably predictable so that the legal advisers of parties have been greatly assisted in negotiating settlements. In the case of non-pecuniary loss they have done this by laying down a scale of damages within the framework of which awards in particular cases can be fitted. There is no doubt that professional opinion considers some judges more generous in their awards than others but perhaps to no greater extent than, in their criminal jurisdiction, some judges are considered more lenient in their sentences than others. And, so long as awards and sentences depend upon the exercise of individual judgment and discretion, some variation is no doubt inevitable.

210. This uniformity (and hence the predictability of awards) has been achieved by a consensus between judges and by the exercise of the Court of Appeal's power to alter a judge's award if it is out of line.[150] This approach to the assessment of personal injury

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149. See para. 9 above.

150. See para. 96 above.

damages is of recent development. In the years between 1951 and 1960 the Courts were, on the whole, cautious in their approach to uniformity but the last decade has seen a rapid development of the principle. The turning point can probably be traced to the early 1960's and be exemplified by three cases concerning the loss of an eye tried at about that time. In Bloomfield v. British Transport Commission[151] the judge awarded £1,500. In the Court of Appeal the plaintiff contended that a conventional figure of £2,000 had been established, but the Court of Appeal rejected the submission that an appeal could be based on a so-called conventional figure. In Bastow v. Bagley[152] the award was £1,150 and the appeal by the plaintiff was again, at first, rejected. Two days later Wharton v. Sweeney[153] came before another Division of the Court when an appeal was allowed from a judge's award of £850 and the award increased to £2,000, Ormerod L.J., in his judgment, making a cautious statement about the desirability of uniformity. The appeal in Bastow v. Bagley was then reinstated and the award increased to £1,800, Sellers L.J. saying that the disparity between the award in Wharton v. Sweeney and the instant case was too great to be just and fair to the plaintiff. Since these cases the desirability of uniformity has been more and more explicitly expressed.

211. Prior to the last war jury trials were frequent in claims for damages for personal injury. The restrictions imposed during the war led to a great reduction in the use of jury trials

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151. [1960] 2 Q.B. 86.

152. [1961] 1 W.L.R. 1494.

153. (1961) 105 S.J. 887.

in the years after the war, but they still continued to play a not insignificant part in the trial of personal injury claims. They did not, however, fit in with the concept of uniformity which was being developed by the Courts and in two cases in 1965[154] the Court of Appeal laid it down that, save in exceptional circumstances, the Court should not exercise its discretion to allow a jury in actions for personal injuries. These two decisions have led to the virtual disappearance of juries from this sphere of litigation.

212. After the decision in Ward v. James a number of M.Ps set down a motion deploring the decision on the ground that if it became even more difficult to obtain trial by jury, awards would remain standardised at too low a level; and indeed it may be that the two jury awards of £50,000 to quadriplegics in Morey v. Woodfield (No.2)[155] and Warren v. King[156] did have the effect of increasing the level of damages in the most serious cases, an increase which might not have happened so quickly without juries.

213. It is the interposition of the lay element into the assessment of awards, brought about by jury trials, which furnishes the major arguments propounded by those in favour of a return to jury trial in at least some personal injury claims. It is contended that juries would be likely, at least on average, to award more than judges; and that, juries being more in touch with the ordinary man's view of the appropriate level of current awards, they would be a fairer tribunal than a judge alone.

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154. Hodges v. Harland and Wolff [1965] 1 W.L.R. 523 and Ward v. James [1966] 1 Q.B. 273.

155. [1964] 1 W.L.R. 16.

156. [1964] 1 W.L.R. 1

214. The arguments against the use of juries in this type of litigation are, however, formidable. The principles of uniformity and also of predictability would necessarily be much weakened. It would be wholly impracticable to have jury trials in every case and the choice of case in which to allow this method of trial would present difficulties. Jury trial is more expensive, and causes much inconvenience to the people who have to serve as jurymen.

215. Another reason which militates against any increased use of juries is that they are not the most suitable tribunal for assessing pecuniary loss, particularly if, as we hope, the method of this type of assessment becomes more sophisticated.

216. We have already referred to the view held by some that the judges are not necessarily the best people to fix the conventional scale of damages for non-pecuniary loss[157] but even if this be the right view we do not favour their replacement or partial replacement by juries. We consider that the disadvantages of jury trial far outweigh any advantage they may have over trial by judge alone and we do not favour any increase in their use. It is to be noted that the Winn Committee decided to make no recommendations for change in the present practice with regard to jury trial.[158]

A damages tribunal?

217. The Winn Committee "carefully considered whether it would be advantageous to provide any assessor or expert to sit with a judge or alternatively to provide advice for the judge without

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157. See paras. 72 and 95-97 above.

158. Cmnd. 3691/1968, para. 478.

subjecting the adviser to cross-examination by either party".[159] They found themselves "unanimously of the opinion that none of the proposed changes as to the constitution of the Court of trial is to be recommended".[160] The Committee further said:-

> "Our views upon the necessity, which we affirm, for insisting that all material upon which a judge is asked to make findings upon liability or quantum of damages should be openly presented to him in the presence of the parties are in line with the thinking of the Evershed Committee on Supreme Court Practice and Procedure which as set out in paragraphs 366-368 of their Report (Cmnd. 8878/1953) led them:-
>
> (a) to reject the use of fact finding tribunals .... whose conclusions would be binding on the Court;
>
> (b) to advise against the creation of any special tribunal for the assessment of quantum of damages consisting of a lawyer and a medical man."[161]

We agree with these conclusions.

## (I) ITEMISATION OF THE HEADS OF DAMAGE

### Itemisation in the light of Jefford v. Gee

218. Early in 1970 the Lord Chancellor asked us to make an interim report dealing with the limited issue of the itemisation of damages in judgments. On 13 April 1970 we circulated for comment Published Working Paper No. 27 which dealt with this subject. Our provisional conclusion then was that legislation should be introduced to:-

(a) make it obligatory for the Courts in all cases to assess separately the various heads of pecuniary

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159. Ibid., para. 405.

160. Ibid., para. 406.

161. Ibid., para. 408.

loss, and

(b) ensure that in all cases the sum of these amounts should be a non-reducible part of the global award.

219. Shortly before the publication of Working Paper No. 27 the Court of Appeal gave its decision in the case of Jefford v. Gee[162] the effect of which we have summarised in an earlier part of this paper[163] where it has been seen that the Courts have now, to a limited extent, to itemise their awards. However, it is still not required that there should be any division of special damage and future pecuniary loss between loss of earnings and loss of expenses.

220. There is further uncertainty remaining after the decision in Jefford v. Gee which arises from the distinction between loss of earnings (where these are more or less capable of present computation) and loss of earning capacity (where there is no actual present loss but a possible future loss). We think that loss of earning capacity should be treated as a future pecuniary loss and not as part of the non-pecuniary loss.

221. The arguments in favour of itemisation remain despite the limited effect of Jefford v. Gee and, after consultation on Working Paper No. 27, we are still of the opinion that legislation would be desirable. This opinion has indeed been strengthened by the decision of the Court of Appeal in Smith v. Central Asbestos Co., discussed in paragraphs 108-116 above. The form which such legislation would take depends on whether our provisional view on a legislative tariff for non-pecuniary loss is accepted.

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162. [1970] 2 Q.B. 130.

163. See paras. 32 and 33 above.

## (J) PERIODIC PAYMENTS AND PROVISIONAL AWARDS

### Introductory: the possible defects in once-and-for-all lump sum awards

222. The argument in this paper has till now been presented upon the assumption that the law which requires damages to be awarded as a lump sum remains unaltered.[164] We must now consider whether this method of awarding damages ought to be replaced or supplemented.

223. The award of a lump sum as damages may and sometimes must result in injustice. This is primarily because the Court is attempting to compensate for loss in the future. In Part II[165] we referred to some of the various types of uncertainty which, it is argued, render lump sum awards imprecise and, therefore, unjust. It is, perhaps worth while attempting to summarise the different sorts of uncertainty with which a Court is faced:-

(a) There are cases where the injury suffered may result in some catastrophe such as epilepsy, cancer or total blindness: medical prognosis can estimate the chance only. If the chance is compensated injustice may result. In what follows we call these "chances".

(b) The more usual situation is where a lump sum award can turn out in the event to have been the correct award; arthritis occurs at the date and to the

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164. Fournier v. Canadian National Railway [1927] A.C. 167.

165. See paras. 18, 31 and 41 above

degree prognosed; the plaintiff's partial loss of earnings continues at the precise amount forecast for the period envisaged; and the economic climate in which he spends his remaining days is that upon which the Court based its award. We call these "forecasts".

(c) There is a third type of speculation in which a Court must indulge; in cases where damages are claimed for loss of dependency it can never be known what the deceased's future would have been nor can it ever be postulated as certain that a plaintiff would, had he not been injured, have lived a life patterned as the Court, in awarding damages, assumes it would have been. Whatever type of award is made, the need for this sort of speculation will remain and allowances will have to be made for these sorts of contingency. We call these "contingencies".

224. To overcome the deficiencies of the lump sum system two possibilities have to be examined:-

(a) A provision that lump sum awards should be supplanted or supplemented by an award of periodic payments.

(b) The introduction of a system of provisional awards.

225. A periodic payments system involves the replacement of a lump sum award by an award of a series of payments payable at intervals in the same way as a pension. Such a system can

either stand on its own as the sole award or it may be coupled with a lump sum payment covering part of the total award. Once the amount of the periodic payments has been decided they can thereafter either be variable so as to reflect changing circumstances or remain fixed. A provisional award system would permit the Court to make a lump sum award assessed according to the facts ascertainable at the date of trial, which could be later adjusted if there was a change of circumstances. We consider these two possible systems separately.

(i) PERIODIC PAYMENTS

The concept of periodic payments

226. The primary reason which has led us to consider the possibility of a system of periodic payments is the uncertainty caused by the Courts having to make forecasts. There are also paternalistic arguments in favour of such a system which still find expression.[166] In Germany, at the end of the nineteenth century, when periodic payments were introduced as the primary remedy for pecuniary loss, they were thought of as being a protection of the plaintiff from his own prodigality and of the taxpayer from the plaintiff becoming, through prodigality, a burden on social security. We do not, however, think that, in today's climate of opinion, any such justification would find much support.

166. See the speech of Baroness Summerskill in the Debate on the Law Reform (Miscellaneous Provisions) Bill 1971 on 20 April 1971 (Hansard: Lords No. 790, Col. 549).

227. To afford any amelioration of the injustice caused by erroneous forecasting a system of periodic payments would have to be variable and it is, therefore, only with such a system that we are here concerned.

228. If it were thought desirable to introduce a system of periodic payments there is no lack of models upon which one could be based. Many European countries have such a system and they are discussed in some detail in a most valuable article by Professor J. G. Fleming.[167] Until recently, however, no Common Law jurisdiction operated such a system. The first experiments come from Australia; in South Australia interim periodic payments are authorised pending a postponed final assessment of damages;[168] in Western Australia final awards of periodic payments are permitted as an alternative to lump sum awards in claims arising out of motor accidents.[169] As Professor Fleming points out, however:-

> "The attractions of the rent-system for common lawyers, which the last-mentioned developments seem to reveal, are shared with much less enthusiasm by those more familiar with it in their own countries."[170]

229. Before we consider whether a periodic payments system ought to be introduced we think it would be helpful if we look in greater detail at how such systems operate in other countries. We discuss Germany's lengthy and Western Australia's

167. "Damages, Capital or Rent?" (1969) 19 University of Toronto Law Journal, 295.

168. Supreme Court Act Amendment Act (No. 2) 1966-67 (No. 21 of 1967), s.4, adding s.30b to the Supreme Court Act 1935-66.

169. The Motor Vehicle (Third Party Insurance) Act Amendment Act 1966.

170. Op. cit. p.296.

brief experience.

The German system

230. Periodic payments are prescribed by statute as the normal remedy for future loss of earnings and capital awards are only authorized for weighty reasons. However, periodic payments in respect of non-pecuniary loss are very rare and, when awarded, they are generally coupled with a lump sum and are often intended to punish the defendant by reminding him of the damage he has caused. Future medical expenses are, somewhat surprisingly, usually dealt with by a lump sum award although where there is a claim for, e.g. lengthy treatment in a sanatorium, periodic payments are sometimes awarded.

231. Periodic payments in respect of future loss of earnings are generally awarded until the age of 65, at which age old age pensions begin. The award may be made for a fixed period, say ten years, and re-assessed at the end of that period. In an award the judge takes into account all contingencies of which evidence is led and makes a finding of what the average earnings over the period are likely to be. It is only if a contingency is unforeseen (and therefore not taken into account) that it will form a ground for variation. Medical prognosis as to possible deterioration of the plaintiff's medical condition is taken into account as a contingency. Periodic payments in respect of loss of earnings are only awarded for the actual (not pre-accident) expectation of working life.

232. The uncertainty inherent in taking into account unforeseen (but not accurately predictable) contingencies is ameliorated by the device of the declaratory order. Where a declaratory order is made applications to vary can be made under it in respect of new sequelae, while unforeseen changes in sequelae existing at the trial can be similarly dealt with. A declaratory order can also be made with a lump sum award and without such an order there would have to be a dramatic unforeseen change to justify an application to vary. Where a declaratory order is made the thirty year prescription period runs from the date of the order and no application to vary can be made after that period unless a new order is obtained. Awards are variable upwards or downwards and on the application of plaintiff or defendant.

233. Periodic payments awarded to widows end on re-marriage unless the new husband is unable to support her in a reasonable way. But they only end on re-marriage in the strict sense. Unions exist where there is no marriage and the only reason for not marrying is to keep a periodic payment. Such unions are known colloquially as "Onkelehe".

234. If a "net" judgment is awarded the defendant pays the plaintiff the amount of the judgment and also pays the plaintiff the tax on this amount. The tax is paid by the plaintiff to the Revenue.

235. Periodic payments are unpopular with both plaintiffs and insurance companies. The fact that plaintiffs want lump

sum awards and that insurance companies can in law hold out for periodic payments strengthens the hand of insurance companies in negotiation and enables them to impose terms upon plaintiffs. Lawyers dislike having to supervise the collection of periodic payments.

236. The unpopularity of periodic payments has been a contributory factor in "dwarfing into statistical insignificance"[171] periodic payments. It is the almost invariable practice to cast settlements (over 99 per cent of compensated claims) into the form of lump sums, and into these settlements, insurance companies insert a clause to the effect that the settlement is final and conclusive. However, if a really dramatic change occurs which causes the plaintiff great hardship, he will nevertheless be permitted to apply for a variation.

The Western Australian system

237. In 1966 a Third Party Claims Tribunal was established in Western Australia with power to award periodic payments. This power has been used sparingly - for instance, only four such awards were made by the Tribunal in its first year. In only one case has the Tribunal set out its views as to when such an award should be made. On 10 May 1971 Heenan D.C.J. in his Reasons for Judgment in Minniti v. Fowles (unreported)

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171. Fleming op. cit. p.297.

said:-

> "The Act provides no criterion for assessing or reviewing the amount of periodical payments, but it seems that an award of periodical payments to cover expenses such as hospital nursing and maintenance fees as they are incurred should involve no speculation and no difficulty either in the initial assessment or in subsequent review. An award of periodical payments to cover loss of earnings, while in theory involving no speculation, is more likely to produce difficulty and, as a result of my experience with this application, I have considerable doubt as to whether such an award is appropriate in a case like this where there is every prospect, not only of frequent variations in the rates of remuneration applicable in the appropriate market and consequently frequent reviews of the amounts of those payments, but also of challenges to the extent of the plaintiff's incapacity involving, on the occasion of each review, re-digesting the evidence given and findings made at earlier hearings before the Tribunal, the constitution of which varies from day to day."

238. It has, moreover, been strongly represented to us by those with experience of the working of the Motor Vehicle Third Party Insurance Acts 1966-1969 that the award of damages by means of periodic payments gives rise in practice to the following difficulties:-

(a) It destroys all initiative on the part of the plaintiff. As a result of being awarded damages in the form of weekly periodic payments equivalent to their pre-accident earnings, injured plaintiffs are not prepared to prejudice the receipt of such payments by indulging in work activity, even when such activity is part of a carefully designed course of medical treatment. In the result the award of weekly periodic payments hinders the medical rehabilitation of injured plaintiffs.

(b) There is no end to litigation because application for variation of the periodic payment can be made at any time by either party. Technically and practically every time inflation takes a further toll or there are wage increases, or increases in medical or hospital fees, the plaintiff is able to apply to the Court for review of the weekly payment awarded to him.

Questions to be answered

239. In devising any system of periodic payments there are obvious questions which must be answered:-

(a) Should the system be discretionary or, as in Germany, obligatory?

(b) If discretionary, who should be permitted to apply for a periodic award?

(c) Should the award be variable both upwards and downwards?

(d) To what heads of damage should the system apply?

(e) For what period should the award be made?

(f) In what circumstances and how frequently should applications to vary be permitted?

(g) How should contingencies (as opposed to "chances" and "forecasts") be taken into account?

Discretionary or obligatory?

240. We have seen that periodic payments may not be popular with litigants despite their theoretical advantages and, unless on consultation we discover a very wide demand for an obligatory system, we would strongly favour a system which provided the Courts with an optional alternative method to lump-sum awards. Further there are many claims where the plaintiff's injury has only temporary effects and such claims clearly are best dealt with by a lump-sum award.

Who should be permitted to apply?
Variable upwards or upwards and downwards?

241. These two questions are interlinked because if the variation is for a worsening of the effects of the injury it will be the plaintiff who will wish to apply; but if the effects of the injury diminish the defendant will wish to apply.

242. It is self-evident that to take away the injustice caused by erroneous forecasting an award would have to be variable both upwards and downwards. If a plaintiff who, at the date of trial, is expected to have a full working life with only a partial loss of earnings can apply when arthritis of unexpected severity renders him prematurely unemployable, justice demands that a defendant should be able to apply if, under the stress of his handicap, he develops new skills which give him a higher earning capacity and negative the expected partial loss.

243. But there are powerful arguments against permitting the reduction of an award on a defendant's application, and, similarly, against allowing defendants to apply for a periodic payment award in the first place. As well as the argument that the right to apply for periodic payment against the plaintiff's wishes strengthens an insurance company's negotiating position undesirably, there is the stronger argument that a plaintiff, who should be doing everything possible to rehabilitate himself and to adjust to the result of his injuries ought not, psychologically, to have the "spectre of reducing awards" hanging over his head.[172] There is a real danger that victims would become resigned "to live off their injuries rather than resolved to live with them". The possibility of intentional malingering might lead insurance companies into undertaking undesirable surveillance of plaintiffs. The phenomenon of accident (or compensation) neurosis is now generally accepted as a genuine and uncontrollable anxiety state not infrequently found in the victims of accidents. It is accepted that the payment of compensation can allay the latent source of anxiety. It is very doubtful whether a reducible periodic payment would have the same effect.[173]

244. We are provisionally convinced by these arguments and

172. This view is reinforced by the opinion of the medical profession in Western Australia. This argument does not of course apply to periodic payments to dependants in Fatal Accidents Acts cases.

173. In Germany the presence of an anxiety neurosis of this kind is a good reason for the award of a lump sum.

would not favour a system whereunder the defendant could apply for a periodic award which was variable downwards. In this conclusion we appreciate that we are greatly weakening the arguments in favour of periodic payments and we would welcome views upon it.

To what heads of damage?

245. The amount of damages awarded for non-pecuniary loss depends upon a conventional scale and, whether or not the scale continues to be drawn as it is now or in some other way, we do not think there is any valid alternative method. It is, of course, true that the application of the scale to any particular victim's condition depends upon forecasting upon the evidence of medical prognosis so that this head of damages is one which is theoretically capable of a more just solution by the use of a system of periodic payments. The computation of a periodic payment would presumably still have to begin with arriving at a lump sum amount which would then have to be converted into an annuity; this stage would present no difficulty to an insurance company. The payment would end on death so that premature death would benefit the defendant, longevity over the average, the plaintiff. The award would have to be accompanied by a very full judgment declaratory of all the factors, contingencies, etc., taken into account in arriving at the lump sum before conversion. If the forecasting of any of these was proved substantially erroneous by future events, an application for variation could be made to the

Court. Such a system would also be capable of dealing with what we have called the "chance" situation; the judgment would declare that no part of the award was referable to, say, the possibility of epilepsy, and, if epilepsy supervened, an application for variation could be made. But, as we shall argue in paragraphs 253-256 below, the "chance" situation could as well be dealt with within a lump sum system, by a provisional award.

246. Our provisional view is that, even if a periodic payment system were introduced, it ought not to apply to non-pecuniary loss. If a plaintiff wishes to convert a lump sum award into an annuity he can do so without the help of the Court and we think that chance and perhaps the more extreme cases of possible faulty forecasting in relation to non-pecuniary loss can be better dealt with by a system of provisional awards. It is our view, therefore, that any system of periodic payments ought to be limited to future pecuniary loss including both loss of earnings and expenses.

For what period?

247. So far as future loss of earnings are concerned the period for which the award should be made would presumably have to be the estimated future working life of the plaintiff or his earlier death. For expenses, such as nursing-home expenses, it would have to be for life or until circumstances rendered them no longer necessary.

In what circumstances and how frequently could variation be sought?

248. These questions are not easy. We think that the only way in which applications based upon trivial changes in circumstances could be prevented would be by some general requirement of reasonableness. Again it is not easy to say whether the changes justifying an application ought to be limited to those personal to the plaintiff or whether external economic changes ought to be allowed to justify an application. Ought the man handicapped by injury in the open labour market, who has an award based upon partial loss of earnings, to be allowed to apply for variation if local or national unemployment causes him to lose a job he would, if physically fit, have kept? It would be possible to make automatic adjustments to the amount of periodic payments to take account of inflationary or, less likely perhaps, deflationary movements in the economy by, say, linking them to the cost of living index. We find these questions difficult and will welcome views upon them. Our provisional view is that any system of periodic payments should be so devised as to take into account any alteration whether personal or external to the plaintiff, which substantially altered the real value of his award.

How should contingencies be taken into account?

249. In a Fatal Accidents Acts claim the Court takes into account the contingencies which would have faced the deceased

during his working life had he lived. In the sort of case where the deceased was in stable employment without any real chance of promotion this must mean basing the award on less than his full earnings at death, over his full expectation of working life at the time of death. Presumably, therefore, in any system of periodic payments, this would mean that the widow would be awarded a sum of money less than her actual proved dependency at the date of death.[174] Theoretically there is nothing wrong with this, but we suspect that plaintiffs would be very reluctant to apply for periodic payments on this basis. Difficulties would also arise in cases where the deceased had good chances of promotion. The Court would either have to take an average, in which case the widow would be awarded an amount in excess of her dependency at the date of death, or make a complicated order which would automatically be varied upwards at dates in the future at which the deceased would, had he lived, have been likely to obtain an increase in salary.

Factors bearing on the introduction of a system of periodic payments

250. The arguments in favour of a system of periodic payments are strong. The English law of damages is founded upon the principle of restitution but we have seen that in

174. Such a reduction would also be relevant, perhaps less obviously, to claims by injured plaintiffs for lost earnings.

compensating for future loss by a lump sum payment this principle cannot be followed. Periodic payments would make restitution, so far as future pecuniary loss is concerned, possible. In the Debate in the House of Lords on the Law Reform (Miscellaneous Provisions) Bill[175] such a system found weighty support in the speeches of several Law Lords, one of whom, Lord Diplock, moved an amendment to the Bill which would have given the Courts power in certain circumstances to award periodic payments in Fatal Accidents Acts claims which would have been variable upwards or downwards and upon the application of the plaintiff or defendant. It is not clear from the Debate whether the "material change of circumstance which has resulted in the payments ordered to be made ceasing to be a fair assessment of the financial loss likely to be sustained by such dependant after the date of application"[176] was intended to apply to what we have called an external change.

251. It is our view that any system should be a sophisticated one devised to apply as widely and comprehensively as possible. This would undoubtedly entail fairly complicated administrative machinery and would, if operated, lead to a significant increase in the work load of the Courts. It would, we think, only be worth introducing such a system if one were satisfied that it would be used by a significant number of litigants and we hope that, after consultation, we shall be able to form a more accurate view on this aspect.

175. Hansard: Lords No. 792, Cols. 521-549.

176. Hansard: Lords No. 794, Cols. 1527-1595.

252. The arguments against a system of periodic payments have, we think, been sufficiently canvassed in our consideration of the questions which inevitably arise when one attempts to devise such a system. If we are right in our provisional view that any system should allow only for variation upwards then this fact would, we think, form a very strong argument against the introduction of such a system.

### (ii) PROVISIONAL AWARDS

#### The case for provisional awards

253. It is our provisional view that the element of what we have called "chance" in an assessment of damages presents a grave and remediable injustice. No one with experience of handling personal injury claims can have failed to be deeply worried when settling the claim of a man diagnosed as having, say, a 10% chance of epilepsy. In his 1965 Bentham Club lecture, Lord Parker referred to the case of a boy whose brain was pushed back into his skull after the accident by a bystander and to his worry lest the medical evidence, to the effect that no harm was done, might yet prove to have been mistaken. Similarly, Willmer L J thought in Oliver v. Ashman[177] that in exceptional cases there should, perhaps, be power to make a provisional award and to adjust it if circumstances changed.

254. We think that there are strong arguments in favour of

177. [1962] 2 Q.B. 210 at pp. 232-3.

empowering the Courts, within the framework of a lump sum system, to make provisional awards. We think that they should be limited to the sort of case which we have called "chance" cases and, perhaps, to some exceptional instances of what we have called "forecast" cases. In exercising any such power the Court would have to make a declaratory order or judgment which would set out the full facts upon which compensation was being awarded and would make it clear that in the sort of case which we have envisaged nothing was being awarded at that stage for the chance of epilepsy, total blindness or cancer. In the "forecast" sort of case where there is real doubt as to the severity with which, say, arthritis will strike, it would be necessary in the judgment to state, with some precision, the prognosis upon which the award was being made. The Court would probably have to set a time limit, based upon the medical evidence, during which an application to vary could be made. As these are all cases where it is future and catastrophic deterioration which is being guarded against there would never be any need to make provision for variation downwards which, as the original award would have been a lump sum would, in any event, be unacceptable.

255. We do not think that a provisional award of this nature would have the defects envisaged for a periodic payments scheme which was variable downwards; a provisional award of this nature would have no deleterious psychological effect upon a plaintiff. We do not think that such a scheme would

present any difficulties in the case of negotiated settlements; settlement of a case where the plaintiff had a 10% chance of epilepsy would be recorded as being made upon the basis that nothing was being paid for this chance, and, if epilepsy supervened, an application for an increased sum could be made to the Court failing a re-negotiated settlement. The time during which the application could be made would be part of the agreement and would be stated in the record of the settlement.

256. It is our provisional view that the Courts ought to be given this additional power in this sort of case.

## (K) INTEREST ON DAMAGES

### Introductory

257. It is convenient to conclude our discussion of the payment of claims by considering the position with regard to the award of interest on damages in the light of s.22 of the Administration of Justice Act 1969, and the Court of Appeal's direction in the case of Jefford v. Gee.

### The antecedents of the 1969 Act and Jefford v. Gee

258. By the common law a creditor was entitled to interest on a debt from the time when it became payable only when there was an agreement, express or implied, for the payment of interest or when an obligation to pay it could be supported by reference to the custom of merchants or trade usage. By the

Civil Procedure Act 1833[178] interest became payable on contract debts payable at a certain time or made payable on demand, as from the due date of payment and the same Act gave the plaintiff in an action for conversion or trespass to goods a right to interest on the value of the goods at the time of their conversion or removal. By the Judgments Act 1838 money judgments were made to carry interest as from the date of their pronouncement or entry. Awards for damages for personal injuries only allowed for interest on the award in respect of any antecedent period where the principles of the Admiralty law applied. These were said to follow the civil law and interest was allowed on the basis that the defendant had wrongly withheld payment.[179]

259. Section 3 of the Law Reform (Miscellaneous Provisions) Act 1934 gave the Court power to award interest on the sum for which judgment was given in debt or damages in respect of antecedent periods. It is a curiosity of legal history[180]

178. Provisions repealed by the Law Reform (Miscellaneous Provisions) Act 1934. See further para. 259 below.

179. See The Northumbria (1869) L.R. 3 Ad. & Eccles 6 at p.10; this was expressed as a liability ex mora, viz. one arising from blameworthy delay.

180. The curiosity arises not only from the fact that the Admiralty Courts regularly allowed interest on damages, following their old established practice (see e.g. The Aizkarai Mendi [1938] P. 263) but also from the fact that the Law Revision Committee, upon whose Report (Cmd. 4546/1934) s.3 of the 1934 Act was founded, specifically rejected a suggestion that awards for general damages in running down cases and for pain and suffering in personal injury cases should not carry interest for any period prior to judgment.

that from 1934 to 1969 there appears to have been only one contested personal injury case in England (apart from claims deal with under the Admiralty jurisdiction) in which interest on damages in respect of the period between the date of the injury and the date of the award was included in the amount of the award.[181] In June 1969 in Jefford v. Gee at first instance[182] the trial judge allowed interest on the plaintiff's general damages (but not on his special damages) from the date of the accident to the date of the judgment. We will revert to the Court of Appeal's decision in Jefford v. Gee in paragraphs 261-263 below.

260. It seems fair to infer that the plaintiff's claim for interest on his damages in Jefford v. Gee was not uninfluenced by the Report of the Winn Committee made in July 1968, which recommended, inter alia, that all awards for damages for personal injuries should carry interest on the amount awarded from the date of the injury.[183] That Committee recommended certain amendments to s.3 of the 1934 Act and proposed certain guide lines as to the rate and period of such interest. The main recommendation for the amendment of s.3 of the 1934 Act was implemented by s.22 of the Administration of Justice Act 1969 but the suggested guide lines were not incorporated into that section. Thus, although the Court is now under an

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181. The unreported case of Noe v. Nestor (1966) referred to in the report of Jefford v. Gee [1970] 2 Q.B. 130 at p.134.

182. Unreported.

183. Cmnd. 3691/1968 paras. 324-325.

obligation to include interest in an award for damages for personal injury exceeding £200, unless it is satisfied that there are special reasons for not doing so, all other matters are controlled by the Court's discretion. These include the decision as to what components of the award should carry interest, what the rate should be and for what period interest should be paid.

The rules laid down in Jefford v. Gee

261. Section 22 of the 1969 Act came into operation on 1 January 1970 and the appeal in Jefford v. Gee was heard during the following February.[184] Lord Denning M.R. delivered the Court's judgment in March 1970 and the opportunity was taken to lay down the principles to be followed by the Courts in awarding interest under s.3 of the 1934 Act, as amended by s.22 of the 1969 Act, in normal cases. These principles, and the reasons supporting them, may be summarised as follows:-

(a) Special damage (i.e. loss of earnings and medical and out-of-pocket expenses to the date of trial) should carry interest at one-half the "appropriate rate"[185] as from the date of the accident.

The selection of the "half-rate" basis is designed to

184. [1970] 2 Q.B. 130.

185. The appropriate rate is that payable on money in Court which is placed on short term investment account (see Administration of Justice Act 1965 ss.6 and 7 and the Supreme Court Funds Rules 73-80).

provide a rough and ready but fair method of averaging out compensation for earning losses and out-of-pocket expenses which range over a period and comprise an aggregate of smaller, and often trifling, individual sums.

(b) General damages in respect of future pecuniary loss should carry no interest.

The reason given for this rule is that in respect of this component of the award the plaintiff has not been kept out of any money but, in fact, gets a lump sum in advance to compensate him for his future loss.

(c) General damages for pain and suffering and loss of amenities should carry interest at the "appropriate rate" from the date of the service of the writ to the date of trial.

The reasons for this rule are fourfold: firstly, this component of the award is to compensate for the whole continuing period of misfortune beginning with the accident and ending at some future but indefinite date after the trial; secondly, it is not possible to split this component of the award by reference to the date of the trial; thirdly, it cannot be said that the defendant has kept the plaintiff out of his money or ought properly to have paid out the claim until he knows that the plaintiff is suing him; fourthly, it is in the interests of justice that writs should be issued and served without avoidable delay so that claims may be

expeditiously disposed of.

(d) Fatal Accidents Acts claims should carry interest on the award at the "appropriate rate" from the service of the writ to the date of trial.

The reasons for this rule are similar to those given for the rule stated in (c) above.

262. The Jefford v. Gee rules incorporate two important principles concerning interest on damages. The first is that the component of the award which reflects compensation for future (i.e. post-trial) pecuniary loss should carry no interest under s.3 of the 1934 Act as amended. The second is that those components of the award (other than those related to actual pecuniary loss sustained up to the date of trial) which attract interest, only begin to do so when the writ is served.[186]

263. Both the principles we have just mentioned have been the subject of some discussion and criticism. There are, of course, arguments to support the view that all components of the award should attract interest and should do so from the date of the accident. It is, however, necessary to compromise between the interests of plaintiffs and of defendants and their insurers and to reconcile their interests (which may involve a certain dilatoriness in instituting proceedings or coming to trial), with the general aim of avoiding delay in

186. The Admiralty rule about interest in personal injury cases is that damages attract interest as from the date of the Registrar's report on the amount to be awarded (The Aizkarai Mendi [1938] P. 263 at p.279).

the administration of justice and in the disposal of personal injury claims. The Jefford v. Gee rules reflect a compromise of this character. They have now been applied by the Courts for over a year, and we hope that consultation will show whether they are thought to be working well in practice and whether they produce avoidable hardship.

Interest on payments into Court

264. The question of interest on damages also arises in connection with payments into Court, and in such cases there are a number of different questions which may be stated briefly as follows:-

(a) Should a defendant making a payment into Court have regard, in deciding the amount to pay in to the plaintiff's potential entitlement, to interest on his damages or to some component/s of them?

(b) When a plaintiff desires to accept payment into Court in settlement of his claim, should he be entitled to interest in respect of the money paid in, in accordance with the Jefford v. Gee, or any alternative, rules?

(c) Should money paid into Court earn interest and, if so, how should such interest be applied?

(d) What should be the rule as to interest where a plaintiff goes to trial and fails to recover more than the amount paid into Court?

These questions have, to some extent, been canvassed in Jefford v. Gee[187] and in the more recent cases of

187. [1970] 2 Q.B. 130.

Newall v. Tunstall[188] and Waite v. Redpath Dorman Long Ltd.[189]

265. As to whether (a) the defendant should have regard to interest in making his payment-in and (b) the plaintiff should be entitled to receive interest on the sum paid in; there is the basic problem of the feasibility of a defendant itemising his payment-in as between the various components of the claim and calculating the amount of interest which should be added in respect of each component. The difficulty of undertaking these tasks would clearly be great where, at the time of payment-in, special damage is accruing from day to day or the plaintiff's prospects of recovery or decline are uncertain.

266. We believe that in deciding whether to make or to accept a payment into Court the parties are in essence considering the global amounts they are likely to recover or to pay, without regard to interest and, if this is so, the rule on this point expressed in Jefford v. Gee[190] seems correct. As there pointed out, disregarding the interest factor on payments-in is likely to enable the parties to reach a negotiated settlement taking into account the plaintiff's interest entitlement. By contrast, it seems to us that if, assuming it was readily feasible to make the calculation, interest were taken into account on a payment into Court, settlements might be inhibited by protracted arguments about

188. [1970] 3 All E.R. 465.

189. [1971] 1 All E.R. 513.

190. [1970] 2 Q.B. 130 at pp.149-151.

relatively small sums (particularly when tax implications were involved).

267. It is, therefore, our provisional view that a defendant should not have regard to the interest element when quantifying the amount of his payment into Court.

268. The question whether a plaintiff on accepting a payment-in should be entitled to interest thereon was also canvassed in the cases referred to above. In Jefford v. Gee, Lord Denning M.R. said - "If the plaintiff takes the money out of court in satisfaction of the claim, that is the end of the case. He gets no interest because there is no judgment.".[191] In Newall v. Tunstall[192] a plaintiff who obtained leave to accept money paid into Court out of time was refused an order for interest on the money, precisely for the reasons given by Lord Denning M.R. in the earlier case. In Waite v. Redpath Dorman Long Ltd.[193] where the plaintiff did not give notice that he accepted the sum paid in in satisfaction of his claim, but applied for an order for payment under R.S.C. Order 22 Rule 5, an order for interest was again refused and for the same reasons.

269. It seems to us that the reasons for refusing interest in such cases are somewhat technical. If it were desired, the present bar to interest could be eliminated by amending the

191. Ibid. at p. 150.

192. [1970] 3 All E.R. 465.

193. [1971] 1 All E.R. 513.

Rules of Court so that, in appropriate cases, the take-out procedure could be converted into an application for an order and that order treated as a judgment for interest purposes. We would welcome comment on this suggestion.

270. The question whether money paid into Court should earn interest and, if so, how the interest should be applied was also referred to in Jefford v. Gee[194] where Lord Denning M.R. drew attention to the provisions of ss.6 and 7 of the Administration of Justice Act 1965 (and the relevant Supreme Court Funds Rules) and suggested that defendants making payments into Court in future would be likely to ask that such money should be placed on a short term investment account and thus earn interest (currently at approximately 7%) whilst so invested.[195] If this practice were followed, it would seem sensible and feasible to make provision that a plaintiff who decided to accept money paid in should have the benefit of the interest so earned, and it is our provisional view that this course should be taken.

271. Finally, in Jefford v. Gee, Lord Denning M.R. dealt with the payment of interest where a plaintiff goes to trial and fails to recover more than the sum paid into Court in the following terms:-

"If the plaintiff recovers more [than the amount paid into

194. [1970] 2 Q.B. 130 at p.150.

195. Cf. the recommendation in para. 326 of the Winn Committee Report.

Court] (apart from interest) he gets his costs. If he recovers no more [than that amount] (apart from interest) he does not get his costs from the date of the payment in and he will have to pay the defendant's costs. The plaintiff will, of course, in either case, get the appropriate award of interest irrespective of the payment into court."[196]

272. This statement of the position, which clearly relates to cases fought to judgment after a payment-in, is consistent with the remainder of the payment into Court principles expressed in Jefford v. Gee and also provides a clear and definite rule by which the Courts in relevant cases can be guided. Nevertheless, its application may be productive of apparently harsh results. Where, for example, the damages awarded are a little lower than the amount paid into Court, say shortly before the trial, but when the addition to the award of interest to which the plaintiff is entitled produces a total which substantially exceeds the payment-in, it does seem unfair that the plaintiff should have to pay the costs of the trial. But, conversely, the defendant may perhaps long before the trial have made a payment-in which can, in the light of the award, be seen to have reflected an accurate or over-generous assessment of the value of the plaintiff's claim. It seems equally hard that such a defendant should have to pay the trial costs merely because the plaintiff's entitlement to interest on his award produces a total which exceeds the payment-in, perhaps marginally.

273. Whilst, in principle, the Court's discretion as to

196. [1970] 2 Q.B. 130 at pp.149-150.

costs should enable an order to be made which is fair in all the circumstances,[197] we believe that the dictum quoted will be taken as virtually precluding the exercise of judicial discretion by trial judges in the cases in which it applies. We think that this would be unfortunate, particularly in the case where the plaintiff's total recovery is substantially in excess of the amount paid in, since we do not believe that the Court of Appeal intended to lay down a rigid rule for such cases. No doubt some of those we consult will have had experience of how judicial discretion is being exercised in this sort of case.

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197. In the High Court, the Supreme Court of Judicature Act 1925 s.5 and R.S.C. Order 62 Rule 2 (4) and Rule 5.

## SHORT SUMMARY OF PROVISIONAL CONCLUSIONS

For the convenience of the reader the following is a short summary of the provisional conclusions reached by the Law Commission upon the various problems examined in Part III - Matters for consideration - and upon possible reforms in the law. It is hoped that this list and the cross-referrences it contains to the paragraphs in the body of the paper will be of assistance in the preparation of the comments which are invited upon the whole Working Paper but particularly upon all the provisional conclusions. The blank pages opposite the text are designed to facilitate the writing of notes.

Paras 52-58 (A) The rule in Oliver v. Ashman

1. In the context of the present system of obligatory lump sum once-and-for-all awards, the rule in Oliver v. Ashman should be reversed (paragraph 58) and in its place should be substituted one of the three alternative proposals outlined in paragraph 57 viz:-

(a) The reversal by legislation of the rule in Oliver v. Ashman and the adoption of the Skelton v. Collins test:

(b) The dependants might be permitted to bring an action under the Fatal Accidents Acts notwithstanding that the deceased had, during his lifetime, himself recovered damages:

(c) A plaintiff might be enabled to join his dependants in his own action and provision made that the sum awarded to compensate the dependants for what they would probably lose during the "lost years" should be paid into Court.

2. The choice would appear to lie between the first and third of the proposals in paragraph 57 (paragraph 58).

Paras 59-67 (B) Loss of expectation of life considered as non-pecuniary loss - Claims under the Law Reform (Miscellaneous Provisions) Act 1934

3. As argued in paragraphs 59-64, damages for loss of expectation of life should be retained but the award of an arbitrary conventional sum should be abolished. Comment is invited on what should be put in its place (paragraph 64).

4. Claims for non-pecuniary damages for loss of expectation of life should not survive to the estate of the deceased victim (paragraph 66).

5. On the other hand claims for other items of non-pecuniary loss should survive to his estate (paragraph 67).

Paras 68-116 (C) The principles of the assessment of non-pecuniary loss for a living plaintiff

6. From the analysis in paragraphs 68-94 of the Court's present approach to the assessment of non-pecuniary loss, the question is posed (as elaborated in paragraphs 95-97) whether the judges are the proper people to fix the conventional scale of non-pecuniary damages.

7. Paragraphs 98-104 canvass the possibility of introducing a legislative tariff for non-pecuniary damages.

8. On the problem of the so-called overlap between damages for loss of amenity and for future loss of earnings (paragraphs 105-116), paragraph 110 criticises the approach to the overlap problem adopted by the Court of Appeal in Smith v. Central Asbestos Ltd.

9. As elaborated in paragraphs 111-116, it is suggested the proper approach should be for pecuniary loss and non-pecuniary loss to be assessed independently of each other. On this

approach it is suggested that a plaintiff should be entitled to receive full compensation for his pecuniary loss plus the appropriate compensation for his non-pecuniary loss in accordance with the recognised scale. In paragraph 116 it is suggested that it is contrary to logic and justice for there to be any arbitrary adjustment of the overall global award as such.

Paras 117-138 (D) The principles of the assessment of pecuniary loss for a living plaintiff

10. For the reasons given in paragraphs 124-126 it is considered that no general change is desirable in the law with regard to deductions from the award for benefits received.

11. Paragraphs 127-129 discuss the special problem of possible deductions in respect of Unemployment Benefits and Supplementary Benefits. Since no acceptable solution is entirely logical it is suggested (paragraph 129) that benefits received from the State (otherwise than as an employer) should be treated by rough analogy and in the way laid down in section 2 of the Law Reform (Personal Injuries) Act 1948, the plaintiff being given credit for half of the Unemployment and Supplementary Benefits he receives over a five-year period.

12. There is no reason to change the present rule with regard to deductions for expenses saved (paragraph 130).

13. Paragraphs 131-137 discuss the question of deductions in respect of taxation and it is concluded (paragraph 136) that there is no case for any general change in the rule in Gourley's Case. However, in paragraph 137, comment is invited on whether any change is desirable in the present rule by reason of the anomaly which may be thought to arise when the victim of an accident is a person with a large unearned income.

14. As discussed in paragraph 138 it is considered that the present rule with regard to deductions in respect of National Insurance contributions should continue to be applied with the reservation that comments are especially invited on the desirability of adopting the approach advocated by the Trades Union Congress in 1964.

Paras 139-154 (E) The principles of assessment of damages in claims under the Fatal Accidents Acts 1846-1959

15. For the reasons given in paragraphs 142-144 it is considered that, as a result of section 4 of the Law Reform (Miscellaneous Provisions) Act 1971, it will be essential for each child's damage for loss of dependency to be fully assessed: this will lead to a substantial increase in the amounts awarded to children and this development is right.

16. The provisions of the Law Reform (Miscellaneous Provisions) Act 1971, whereby the remarriage of a widow or her prospects of remarriage are not to be taken into account in assessing the damages payable to her, should be extended to apply to claims made by the children of the deceased (paragraphs 145-148). Similarly this provision in the 1971 Act should be extended to the claim of a widower under the Fatal Accidents Acts (paragraphs 149-150).

17. As regards deductions from damages received under the Fatal Accidents Acts (paragraphs 151-152), it is suggested in paragraph 152 that, subject perhaps to certain exceptions, the 1959 Act should be extended to exclude all benefits derived from the estate of the deceased.

18. Paragraphs 153-154 canvass the possible desirability of extending the class of recognised dependants under the Fatal Accidents Acts.

Paras 155-190 (F) The method of assessment of pecuniary loss: Taylor v. O'Connor - Actuarial evidence

19. Paragraphs 157-171 contain a critical analysis of the present rule as affirmed by the House of Lords in Taylor v. O'Connor under which the use of a multiplier, in contrast to the actuarial method of assessment, is to be regarded as the normal and primary method of assessment.

20. As elaborated in paragraphs 172-173, it is suggested that a new approach is desirable to the use of actuarial evidence in the assessment of damages and at paragraph 173 it is concluded that the publication of actuarial tables on some official basis would be useful.

21. Comments are especially invited on the suggestion elaborated in paragraphs 174 and 175 and in particular in paragraph 176 regarding a possible legislative provision aimed to promote the use of actuarial methods in the process of assessment.

22. Paragraphs 177-189 discuss the question of the desirability and feasibility of inflation being taken into account in the assessment of damages. In paragraph 190 the provisional conclusion is reached that a satisfactory answer is capable of being found to the question of allowing for inflation and also to the allied question of the Courts being more ready to adopt the actuarial method of assessment if the matter were approached on the basis that:-

(a) To impose a solution to the problem of inflation by legislation is inappropriate:

(b) The most acceptable way of tackling the question of inflation is that suggested by Lord Diplock in Mallett v. McMonagle i.e. of assessing the damages on the basis that the plaintiff will be able to invest his damages at the rate receivable at the date of the award on good growth equities:

(c) That the approach to inflation advocated in Mallett v. McMonagle itself implies, however, that the process of computing the damages should be done by the application of a discount rate in accordance with actuarial methods rather than by use of the traditional multiplier.

Paras 191-207 (G) Losses incurred by others

23. Paragraph 191 confirms the provisional proposal made in Published Working Paper No. 19 for the abolition of the archaic actions for loss of consortium and for loss of services. It is further provisionally proposed to replace these actions by a new legislative provision for the recovery of damages in proper cases of pecuniary loss suffered by members of the family and by others.

24. Losses incurred by others are dealt with under the two heads "losses incurred by others on the victim's account" and "losses incurred by others on their own account" (paragraph 192).

25. Paragraphs 193-196 discuss pecuniary loss incurred on the victim's account, some types of which are set out in paragraph 195. It is concluded that, subject to the test of reasonableness, the plaintiff should be entitled to recover in respect of all such expenditure. In paragraph 204 it is concluded that such claims should not be restricted to expenditure incurred by members of the victim's family.

26. Paragraphs 197-203 discuss losses incurred by

others on their own account, such losses being in the nature of non-pecuniary damage. It is concluded that this sort of non-pecuniary loss ought not to be recoverable, but that, if compensation in the form of solatium were considered desirable, its amount should be fixed by legislative tariff. In paragraph 205 it is concluded that the class of claimant for such non-pecuniary loss should, in any event, be limited to members of the victim's family.

27. Paragraphs 206-208 discuss the method by which claims for losses incurred by others on the victim's account should be made and it is concluded that the most satisfactory approach is that such claims should be included in the plaintiff's claim with the Court being given power by legislation to give the necessary directions as to the disposal of the damages received under these heads.

Paras. 208-217 (H) The mode of trial for the determination of claims

28. For the reasons elaborated in paragraphs 209-216 it is concluded that any extension of the present rules with regard to trial by jury is undesirable.

29. In line with the views of the Winn Committee it is concluded that there is no case for the establishment of some form of specialised damages tribunal (paragraph 217).

Paras. 218-221 (I) Itemisation of the heads of damage

30. Notwithstanding the ruling of the Court of Appeal in Jefford v. Gee and as elaborated in paragraphs 218-221 it is concluded that the itemisation of the heads of damages should be prescribed by legislation.

Paras 222-256 (J) Periodic payments and provisional awards

31. Paragraphs 222-225 discuss the possible defects in once-and-for-all lump sum awards. Paragraphs 226-249 contain a detailed analysis of the problems arising on the introduction of a system of periodic payments and refer to the experience of other jurisdictions.

32. It is concluded, subject to any views received on consultation, that on balance the objections to a periodic payments system outweigh the possible advantages (paragraphs 250-252).

33. On the other hand it is concluded (paragraph 256) that the Courts should be given the power to make a provisional award in the types of cases discussed in paragraphs 253-255.

Paras 257-273 (K) Interest on Damages

34. Paragraphs 257-263 discuss the rules for the award of interest on damages and how they have been developed up to the ruling of the Court of Appeal in Jefford v. Gee. Paragraph 263 asks for comments on whether the rules in Jefford v. Gee are thought to be working well in practice and whether they produce avoidable hardship.

35. Paragraphs 264-273 discuss the questions which may be thought to arise since Jefford v. Gee regarding interest on payments into Court, and it is provisionally concluded:-

(a) A defendant should not have regard to the interest element when quantifying the amount of his payment-in (paragraph 267).

(b) Money paid into Court should earn interest. To this end the Rules of Court should be amended so that, in appropriate cases, the take-out procedure could be converted into an application for an order and that order treated as a judgment for interest purposes (paragraph 269).

(c) A plaintiff who decided to accept money paid in should have the benefit of the interest earned during the period when the money was in Court (paragraph 270).

(d) On what should be the rule as to interest where the plaintiff goes to trial and fails to recover more than the amount paid into Court, paragraphs 271-273 invite views on how the judicial discretion is being exercised since Jefford v. Gee in this type of case.

## STATISTICS OF PERSONAL INJURIES

### Road accidents

The Road Accidents statistics publised by the Department of the Environment, Scottish Development Department & Welsh Office[1] give the 1969 figures as :-

| | | |
|---|---|---|
| | 7,365 | killed |
| | 90,719 | seriously injured |
| | 254,810 | slightly injured |
| Total: | 352,894 | out of a population of 54,128,000. |

Ten years earlier, 1959, the corresponding figures were:-

| | | |
|---|---|---|
| | 6,520 | killed |
| | 80,672 | seriously injured |
| | 246,261 | slightly injured |
| Total: | 333,453 | out of a population of 50,548,000. |

These figures treat as "seriously injured" anyone detained in hospital as an in-patient, or any one of the following injuries whether or not the victim is detained in hospital: fractures, concussion, internal injuries, crushings, severe cuts and lacerations, severe general shock requiring medical treatment. "Slightly injured" denotes an injury of a minor character such as a bruise or a sprain.

### Accidents on the Railways

On the Railways during 1969[2], 13,533 persons were injured

1. Road Accidents 1969 - Table 1
2. Department of the Environment: Railway Accidents 1969, Appendix II at p. 86.

and 137 were killed; 7,266 of those injured were railway servants, 5,984 were passengers and 283 were other persons.

Factory accidents

The Annual Report of H.M. Chief Inspector of Factories 1969[3] gives the total of all reported accidents in 1969 as 322,390 of which 649 were fatal.

Accidents in Mines

In Coal Mines during 1968[4] accidents of all kinds killed 115 persons and seriously injured 851.

Claims for Industrial Injury and Disablement Benefit

The figures from the Department of Health & Social Security[5] show that in 1970 claims for Industrial Injury Benefit totalled 822,000 compared with 928,000 in 1969 and claims for Disablement Benefit totalled 192,000 compared with 202,000 in 1969.

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3. Cmnd. 4461/1970 at p. 75.
4. Report of H.M. Chief Inspector of Mines & Quaries 1968. Table 3 at p. 57.
5. Department of Health & Social Security Annual Report 1970 (Cmnd. 4714/1971) at p. 87.

# LIST OF THOSE WHO HAVE ASSISTED THE LAW COMMISSION WITH ADVICE AND INFORMATION DURING THE PREPARATION OF THE WORKING PAPER.

(A) Participants in the Seminar on Damages in Personal Injuries Cases held at All Souls College, Oxford in February 1966.

The Rt. Hon. Lord Justice Winn (Chairman of the Committee on Procedure in Personal Injuries Litigation)

The Hon. Mr. Justice Scarman (Chairman of the Law Commission)

Mr. Andrew Martin, Q.C. (Law Commissioner)
Mr. John Churchill (Law Commission and Secretary of Winn Committee)
Mr. D.W.R. Brand, Q.C. (Scottish Law Commission)

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Mr. T.D. Wilson - Royal Insurance Company
Mr. C.R. Dale -(Secretary, Social Insurance Department, T.U.C.)

Professor H. Street (Manchester, author of 'Principles of the Law of Damages')
Professor O. Kahn-Freund (Professor of Comparative Law, Oxford)
Dr. A.M. Honoré (Reader in Roman-Dutch Law, Oxford)
Mr. D. R. Harris (Balliol College, Oxford)

Also present were the Warden and some Fellows of the College (including Professor A.R.P. Cross, the Hon. Sir Henry Fisher, Mr. F.P. Neil, Q.C. and Mr. J. F. Lever).

(B) Those who submitted written comments relevant to the problems of Family Loss raised in Published Working Paper No.19 - the Actions for Loss of Services, Loss of Consortium, Seduction & Enticement, dated 14 June 1968.

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National Council of Women
National Federation of Professional & Business Women's Clubs
National Coal Board

(C) Those who submitted written comments on Published Working Paper No.27 - Itemisation of Pecuniary Loss and the use of Actuarial Tables as an aid to assessment, dated 18 March 1970.

The Rt. Hon. Lord Wilberforce

The Rt. Hon. The Master of the Rolls, Lord Denning
The Rt. Hon. Lord Justice Russell
The Rt. Hon. Lord Justice Salmon
The Rt. Hon. Lord Justice Winn

The Rt. Hon. Lord Justice Sachs
The Rt. Hon. Lord Justice Edmund Davies
The Rt. Hon. Lord Justice Atkinson
The Rt. Hon. Lord Justice Phillimore
The Rt. Hon. Lord Justice Karminski
The Rt. Hon. Lord Justice Megaw

The Rt. Hon. the Lord Chief Justice of England,
Lord Parker of Waddington
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The Hon. Mr. Justice Milmo
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## NOTE ON THE NATURE OF ACTUARIAL EVIDENCE

### The probabilistic approach: its nature and relevance

1. The factors which lie at the root of the actuary's technique of arriving at a 'present value' are the association of a survival probability and a rate of discount.

2. Ideally, the actuary turns to statistics of the experience of a class of lives identical in material character to the individual for whom, in a particular case, a lump sum payment equal in value to a series of annual payments falls to be assessed. He then determines from these statitistics the probability that the individual will survive to receive each future annual payment, multiplies this by the appropriate amount of the payment and discounts to allow for the rate of interest to the present time. The probability of survival can be calculated to allow not only for mortality, but also for early retirement for reasons of ill-health, sickness and other "incidents".

3. By applying this technique to each future payment and summing the results the actuary produces an overall total which gives the amount of the assessment.

4. It matters not that only one individual is to receive the amount of the assessment or that he may die the next day, or for that matter live to be a centenarian. So far as that individual is concerned, at the date of assessment, he is awarded fair compensation in the sense that if there had been a very large number of similar individuals of the same age all receiving the same amount, then overall they would have equated

to the stated payments, allowing for the operation in due time of compound interest and mortality.

5. Another way of expressing this concept is to say that if:-

(a) this very large number of individuals made a pool investment of the total of the identical amounts awarded to each at the interest rate assumed by the actuary for discount purposes, and if,

(b) each received from the pool for the remainder of his lifetime the annual loss for which he had been compensated by recourse to both interest and (to the extent necessary) capital;

it would then result that the total investment would be exhausted on the death of the last survivor provided that the mortality of the group followed the assumed pattern.

6. It would appear that much of the misunderstanding of actuarial techniques which arises in practice stems from the attempt by lawyers to apply the concept of "expectation of life".

7. This particular function of a mortality table is not employed by the actuary in arriving at the present value of a series of annual payments and in fact has very little practical use other than as a conveniently rough measure of the comparison between two or more tables of mortality based on different experiences.

8. The concept "expectation of life" has no real meaning for an individual life and is better defined as the average future lifetime of a very large number of individuals of the same age. It is obvious that the future of any individual in such a group may range from zero to (105 - x) if 105 is the limit of the mortality table and x is the present age. It is also apparent from what has been said above that the application by the actuary of probability theory to the group does not involve the assumption that all members of the group will survive to the limit of the expectation of life for that age and then all die. The actuarial assessment of present value will be correct for the group and therefore, so far as is possible, the best available guide to assessment for any individual member of the group if the mortality of the group follows that of the mortality table employed by the actuary, i.e. if the same proportion die at each age as indicated by the underlying rates of mortality.

9. The theories of probability and present value are not, moreover, invalidated by the situation - very common in practice - that statistics for an identical group of lives do not exist. In practice it is necessary, more often than not, to proceed from the known to the unknown, to the determination of probabilities suitable to a particular risk, using material that is the best available to do the job.

10. The whole of the actuary's training and experience is devoted to bridging this gap - to the choice of the most suitable statistics and, above all, to their application and adjustment to the circumstances of a particular situation, as they are seen to be at a particular moment of time. His opinion of the assessment in an individual case is therefore that of a professional

expert skilled in this very art. Moreover, to discard his opinion on the grounds that precisely relevant statistics are not available would be to deny the usefulness of a technique that lies at the root of innumerable commercial transactions that are taking place daily.

The nature of the actuary's evidence

11. The actuary will be fully instructed on the facts relevant to pecuniary loss and will normally be requested to make calculations and express a professional opinion as to the present value of such loss.

12. Since at the stage of his instruction there may well be facts which are in dispute, the actuary may quite properly be required to give a range of opinions on a number of alternative assumptions as to facts. The giving of such an opinion does not in any way detract from the final responsibility of the judge to form his opinion as to both the facts upon which the case has to be decided and the f air compensation based thereon. The judge must, of course, remain at liberty to assess the relevance and weight of every kind of expert evidence (including that of the actuary) which may be presented to the court.